# NEGOTIATED RATES IN THE TRUCKING INDUSTRY

(101-81)

# HEARING

BEFORE THE

SUBCOMMITTEE ON
SURFACE TRANSPORTATION

OF THE

COMMITTEE ON
PUBLIC WORKS AND TRANSPORTATION
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

**H.R. 3243**

TO AMEND TITLE 49, UNITED STATES CODE, REGARDING THE COLLECTION OF OVERPAYMENTS OR UNDERCHARGES ON SHIPMENTS VIA MOTOR CARRIERS OF PROPERTY AND NONHOUSEHOLD GOODS FREIGHT FORWARDERS, AND FOR OTHER PURPOSES

JULY 19, 1990

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# SUBCOMMITTEE ON SURFACE TRANSPORTATION

# HEARINGS ON H.R. 3243

## SUMMARY OF SUBJECT MATTER

The hearing scheduled for July 19, 1990, deals with the negotiated rate problem in the motor carrier industry. The problem has persisted for several years. Last September, the leadership of the committee introduced H.R. 3243 at the request of a coalition of motor carrier and shipper groups. There has been no action on H.R. 3243.

On June 21, 1990, the Supreme Court in Maislin Industries, U.S. Inc. vs. Primary Steel, Inc. scrapped the Interstate Commerce Commission's (ICC or Commission) method of handling the "negotiated rate" problem and said that the rate on file at the ICC is the rate that must be paid by a shipper. The Court discarded the concept relied upon by the ICC that in certain circumstances collection of the filed rate would be an unreasonable practice, and, thus, not allowed.

The hearing will explore what type of legislation is needed or desired to address the effects of the Supreme Court decision. H.R. 3243 was drafted prior to the decision, and certainly, a core issue will be whether or not that legislation now fully addresses the effects the decision will have on pending claims, future claims, and the authority and capability of the ICC to deal with these claims.

## SENATE ACTION

The Senate has scheduled a hearing for July 17, 1990, on the issue. There is no Senate Bill.

## BACKGROUND

Motor common carriers are required by 49 U.S.C. 10761 to file tariffs setting forth charges for all transportation services and to collect only the published tariff rates.[1] The law also contains a requirement (U.S.C. 10701) that carriers' practices be reasonable. Rates are filed at the ICC.

In a series of cases decided in the early part of this century, the Supreme Court developed principles that later became known as the "filed rate" doctrine. That doctrine dictates that when a carrier files an action in court seeking to recover unpaid tariff charges, the court may not entertain any defense based on the carrier's misquotation of the tariff rate or the shipper's ignorance of that rate.

The 1980 enactment of the Motor Carrier Act, Pub. L. No. 96-296 (MCA) revised the transportation policy of the United States by encouraging a more competitive environment in the motor carrier industry. The ICC reacted by changing its tariff regulations to permit rate reductions on one day's notice and to allow carriers to establish rates for named shippers.

Today, it is common practice for carriers and shippers to negotiate individual rates charged for particular transportation services. Until recently, the shippers either generally assumed, or in some cases were expressly told, that the carriers would incorporate the negotiated rates in tariffs that would be properly filed with the ICC.

Some motor common carriers, however, did not always file the tariff with the ICC. As long as the carrier remained a going concern, the failure to file generally went unnoticed. But when a carrier filed for bankruptcy, the receiver or trustee frequently retained an auditor to search the records of the carrier for instances in which the rates billed and collected were lower than the applicable rates on file at the ICC. When these discrepancies were discovered, the receiver or trustee then filed a collection action to recover the difference from the shipper. Rising numbers of motor carrier bankruptcies in recent years (as well as multiple claims attributable to individual carriers) increased significantly the number of collection actions.

As these actions to recover unpaid tariff charges increased, shippers requested the ICC to address the problem. The ICC adopted a policy statement, Negotiated Rates I,[2] designed to address the practice of carrier failure to file negotiated rates. There the Commission indicated an intention to accommodate the antidiscrimination goals of the Act with Congress' new emphasis on competition. The Commission announced that in carrier actions to collect unpaid tariff charges, it would conduct an advisory analysis on referral from a court, to determine whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice, and, if a negotiated rate were found to exist, whether this amount was all the carrier should be permitted to collect. To clarify its initial policy, the Commission issued a second statement on the issue (Negotiated Rates II).[3] This statement reaffirmed that the ICC's authority for its negotiated rate policy was based upon the requirement that a carrier's practices must be reasonable.[4]

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[1] Contract rates, provided for in 49 U.S.C. 10527, are an exception to this requirement.

[2] National Industrial Transportation League - Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 ICC 2d 99 (1986).

In the Maislin case, the Commission found that Maislin's (the carrier) solicitation and billing practices were unreasonable, and that Primary (the shipper) should not be required to pay additional charges for the difference between the negotiated rates and the tariff rates. The district court granted summary judgment in favor of Primary, and the Court of Appeals for the Eighth Circuit affirmed. The Supreme Court granted certiorari, heard oral argument on April 16, 1990, and issued its opinion on June 21, 1990. The Court held that the Commission's negotiated rates policy is inconsistent with the Interstate Commerce Act and is therefore invalid. Justice Stevens and Chief Justice Rehnquist dissented.

A majority of the Court concluded that the Commission's justification for authorizing this departure from the filed tariff schedule was contrary to the language and structure of the statute. The Court stressed that the practice of applying rates different from those contained in tariffs permitted discrimination, a result that is contrary to the intent of the Act.

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[3] Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 ICC 2d 623 (1989).

[4] Five circuits upheld the Commission's Negotiated Rates policy. See Delta Traffic Service v. Transtop, _____F.2d_____ (CA1 1990); Orscheln Bros. Truck Lines, Inc. v. Zenith Electronic Corp., 899 F.2d 642 (CA7 1990); West Coast Truck Lines, Inc. v. Weyerhauser, Co., 893 F.2d 1016 (CA9 1990); Delta Traffic Service & Oneida Motor Freight, Inc. v. Appco Paper & Plastics Corp., 893, F.2d 472 (CA2 1990), and Maislin Industries, U.S. v. Primary Steel, 879 F.2d 400 (CA8 1989). The Fifth Circuit disagreed, ruling that a defense of unreasonableness did not require referral of a case to the Commission, and upheld the district court's grant of summary judgement in favor of the bankrupt motor carrier. In re Caravan Refrigerated Cargo, Inc. (Supreme Beef Processors), 894 F.2d 388 (CA5 1989).

The Court was not swayed by the fact that a carrier that failed to file a tariff reflecting the negotiated rate could receive a windfall due to its omission. The Court stated that such equities were not relevant to application of the Act's requirement that transportation be provided only under tariff rates, and stressed that compliance with sections 10761 and 10762 is central to administration of the Act.

The Court also rejected the Commission's argument that passage of the MCA justifies the Negotiated Rates policy. The Court interpreted the Negotiated Rates policy as being in direct conflict with the Act, and thus concluded that the policy was invalid.

## EFFECT OF THE MAISLIN DECISION

The Commission had 105 claims pending before it as of June 28, 1990, with a dollar value of over $4.8 million.[5] Of these, 41 are court-referred cases and 64 were filed directly with the Commission. Forty-five cases are being held in abeyance at the request of the parties, and the record has not yet closed in 31 cases. The balance are in some stage of preparation or in the voting process (which has now been suspended). Of the 105 cases, at most 20 involve issues other than unreasonable practices. After Maislin, the Commission cannot apply an unreasonable practices theory to resolve the remaining 85 pending cases. Furthermore, these 85 cases represent only a fraction of the potential negotiated rates claims that could be brought. The trade press estimates that the total universe of claims could total as much as $200,000,000.

## SECTION-BY-SECTION

### *H.R. 3243*

*Section 1* adds a new paragraph to subsection 11705(b) of Title 49. The new paragraph provides that where additional charges are sought to be collected after those originally billed and collected by the carrier, the shipper may assert that such action is an unreasonable practice. The ICC has original jurisdiction over the dispute subject to normal judicial review.

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[5] This figure is understated somewhat because it does not include claims for which the amount at issue is unclear.

*Section 2* amends section 11706(a) of Title 49 to shorten the statute of limitations for filing undercharge claims against shippers and overcharge claims against carriers. The statute of limitations will be for 24 months. After one year, it will decrease to 18 months.

*Section 3* adds a new section 11712 to Title 49. It would allow motor carriers and shippers to resolve billing errors (undercharge and overcharge) or incorrect billings resulting from the inadvertent failure to file and maintain rates that have been agreed upon or under circumstances where application of the filed tariff would be an unreasonable practice. The ICC would be required to issue regulations establishing procedures to be followed.

*Section 4* establishes the effective date as date of enactment, except that section 1 would apply to all claims no matter when they were filed. In other words, it applies to pending claims.

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101st CONGRESS
1st Session

# H. R. 3243

To amend title 49, United States Code, regarding the collection of overpayments or undercharges on shipments via motor common carriers of property and nonhousehold goods freight forwarders, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES

September 12, 1989

Mr. Anderson (by request) (for himself, Mr. Hammerschmidt, Mr. Mineta, and Mr. Shuster) introduced the following bill; which was referred to the Committee on Public Works and Transportation

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# A BILL

To amend title 49, United States Code, regarding the collection of overpayments or undercharges on shipments via motor common carriers of property and nonhousehold goods freight forwarders, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## SECTION 1. PROCEDURE FOR COLLECTION OF ADDITIONAL CHARGES.

Section 11705(b) of title 49, United States Code, is amended by adding at the end thereof the following new paragraph:

"(4) Where tariff rates or charges are sought to be collected in addition to those originally billed and collected by a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or a nonhousehold goods freight forwarder, a person may assert that the collection of such tariff rates or charges or imposition of rules, classifications, or practices, would be an unreasonable practice in violation of section 10701 or otherwise a violation of this subtitle and such issue shall be determined by the Commission. In instances where a civil suit is brought under section 11706(a) of this subtitle, such issues shall be referred to and be determined by the Commission under its primary jurisdiction.".

## SEC. 2. STATUTE OF LIMITATIONS.

(a) Motor Carrier Charges.—Section 11706(a) of title 49, United States Code, is amended by striking the period at the end thereof and inserting the following: "*Provided, however,* That a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title must begin within 24 months after the claim accrues a civil action to recover charges for transportation or service which is provided by the carrier on or after the date of the enactment of this proviso: *Provided, however,* That for transportation taking place on or after 1 year following such date of enactment, such civil actions must be filed within 18 months after the claim accrues.".

(b) Motor Carrier Overcharges.—Section 11706(b) is amended by striking the period at the end of the first sentence and inserting the following: "*Provided, however,* That a person must begin within 24 months after the claim accrues a civil action to recover overcharges from a carrier subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title for transportation taking place on or after the date of the enactment of this proviso: *Provided, however,* That for transportation taking place on or after 1 year from such date of enactment, such civil actions must be filed within 18 months after the claim accrues.".

## SEC. 3. TARIFF RECONCILIATION RULES FOR MOTOR COMMON CARRIERS OF PROPERTY.

(a) In General.—Chapter 117 of title 49, United States Code, is amended by adding at the end thereof the following new section:

### "§ 11712. Tariff reconciliation rules for motor common carriers of property

"(a) Subject to Commission review, motor carriers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and shippers may resolve, by mutual consent, overcharge and undercharge claims resulting from billing errors or incorrect tariff provisions arising from the inadvertent failure to properly and timely file and maintain agreed upon rates, rules, or classifications in compliance with sections 10761 and 10762 of this title, or under circumstances where application of the filed tariff would be an unreasonable practice. Resolution of such claims among the parties shall not subject any party to the penalties of sections 11901, 11902, 11903, 11904, and 11914 of this title.

"(b) Nothing in this section shall relieve the motor carrier of the duty to file rates, rules, and classifications as required in sections 10761 and 10762 (except as provided in subsection (a)) for ministerial error or where application of the filed tariff would be an unreasonable practice under section 10701.

"(c) The Commission shall, within 90 days after the date of the enactment of this section, institute a proceeding to establish rules pursuant to which the tariff requirements of sections 10761 and 10762 of this title shall not apply under circumstances described in subsection (a) of this section.".

(b) CONFORMING AMENDMENT.—The analysis for chapter 117 of such title is amended by adding at the end thereof the following:

"11712. Tariff reconciliation rules for motor common carriers of property.".

**SEC. 4. EFFECTIVE DATE.**

(a) GENERAL RULE.—Except as provided in subsection (b), the provisions of this Act (including the amendments made by this Act) shall take effect on the date of the enactment of this Act.

(b) RETROACTION, APPLICABILITY OF SECTION 1.—The amendment made by section 1 of this Act shall apply to all claims filed on, after, or pending as of, the date of the enactment of this Act.

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# NEGOTIATED RATES IN THE TRUCKING INDUSTRY

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THURSDAY, JULY 19, 1990

House of Representatives,
Subcommittee on Surface Transportation,
Committee on Public Works and Transportation,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10:12 a.m. in room 2167, Rayburn House Office Building, Hon. Norman Y. Mineta (chairman of the subcommittee) presiding.

Mr. Mineta. The Subcommittee on Surface Transportation will please come to order.

The subcommittee is meeting for the purpose of receiving testimony on a rate problem that has occurred in the motor carrier industry. The problem is commonly referred to as the "negotiated rate problem." The problem soared to prominence in the last several years, largely due to a combination of motor carrier industry bankruptcies and rampant discount policies which were fostered by a hotly competitive climate.

The genesis and attempted resolution of the negotiated rate problem have been the subject of a great deal of discussion, and recently the United States Supreme Court stepped into the controversy by reckoning what existing Federal regulatory law does in fact require. As a result of that court decision, *Maislin Industries U.S., Inc., et al.,* v. *Primary Steel, Inc.,* the controversy has shifted to the legislative arena.

The central legislative question now facing this committee is whether or not any defense to the filed rate doctrine should be allowed, either on an interim or permanent basis. It's my hope and I expect that the witnesses appearing before us today will shed some light on the proper course of action which the Congress should take.

At this time, I'm pleased to yield to our very distinguished and fine Republican ranking member, Congressman John Paul Hammerschmidt of Arkansas, from the full committee.

Mr. Hammerschmidt. Thank you very much, Mr. Chairman.

You have a lot of witnesses here, and I'm not going to make a long statement, but in view of the Maislin case decision where the court upheld a filed rate doctrine, I think it's very appropriate that we review this issue. I commend you for holding this hearing in such a timely manner, and I ask unanimous consent to put a statement in the record.

Mr. MINETA. Without objection, so ordered. At this time, I would also like to put into the record an opening statement by our colleague from Illinois, Congressman Costello.

[The prepared statements of Mr. Hammerschmidt and Mr. Costello follow:]

# STATEMENT OF THE
# HONORABLE JOHN PAUL HAMMERSCHMIDT
# SUBCOMMITTEE ON SURFACE TRANSPORTATION
# NEGOTIATED RATES HEARING

THURSDAY, JULY 19, 1990 - 10:00 A.M.
10:00 A.M., 2167 RAYBURN HOB

THANK YOU MR. CHAIRMAN FOR SCHEDULING THIS TIMELY HEARING ON AN IMPORTANT ISSUE WHICH AFFECTS MANY TRANSPORTATION INTERESTS AND TOUCHES AT THE HEART OF THE ECONOMIC REGULATORY SYSTEM FOR THE MOTOR CARRIER INDUSTRY.

MOTOR COMMON CARRIERS ARE REQUIRED BY THE INTERSTATE COMMERCE ACT TO FILE TARIFFS FOR TRANSPORTATION SERVICES AND TO COLLECT ONLY THE PUBLISHED RATES. SINCE DEREGULATION OF THE MOTOR CARRIER INDUSTRY IN 1980, IT HAS BECOME COMMON PRACTICE FOR SHIPPERS AND CARRIERS TO NEGOTIATE TRANSPORTATION RATES. SHIPPERS GENERALLY ASSUME OR ARE EXPRESSLY TOLD THAT MOTOR CARRIERS WILL INCORPORATE THESE NEGOTIATED RATES IN TARIFFS PROPERLY FILED WITH THE ICC.

SOME MOTOR CARRIERS; HOWEVER, HAVE NOT COMPLIED WITH THE STATUTORY FILING REQUIREMENTS. THIS HAS LED TO A SIGNIFICANT PROBLEM IN SITUATIONS WHERE A MOTOR CARRIER HAS SUBSEQUENTLY FILED FOR BANKRUPTCY.

THE RECEIVER OR TRUSTEE FREQUENTLY RETAINS AN AUDITOR TO SEARCH THE RECORDS OF THE CARRIER FOR INSTANCES IN WHICH THE RATES BILLED AND COLLECTED WERE LOWER THAN THE RATES ON FILE AT THE ICC. THE RECEIVER THEN FILES A COLLECTION ACTION TO RECOVER THE DIFFERENCE FROM THE SHIPPER.

SHIPPERS ARE OBVIOUSLY QUITE UPSET AT BEING ASKED TO PAY AN ADDITIONAL CHARGE TO MAKE UP THE DIFFERENCE BETWEEN THE NEGOTIATED RATES AND THE TARIFF RATES.

THIS HAS LED TO A MAJOR DISPUTE BETWEEN SHIPPERS, ON THE ONE HAND, AND COLLECTION AGENTS AND MOTOR CARRIERS, ON THE OTHER HAND. TO MAKE A LONG STORY SHORT, THIS DISPUTE WOUND UP IN THE SUPREME COURT WHICH, IN THE RECENT MAISLIN CASE, SIDED WITH THE COLLECTION AGENTS.

THE COURT UPHELD THE "FILED RATE DOCTRINE" AND RULED THAT A SHIPPER MUST PAY THE UNDERCHARGE, EVEN THOUGH THE BANKRUPT MOTOR CARRIER WAS RECEIVING A WINDFALL THROUGH ITS OWN FAILURE TO FILE ITS TARIFFS IN ACCORDANCE WITH INTERSTATE COMMERCE ACT.

MR. CHAIRMAN, IT IS VERY APPROPRIATE THAT WE REVIEW THIS ISSUE, AND I COMMEND YOU FOR HOLDING THIS HEARING IN SUCH A TIMELY MANNER.

AS WE CONSIDER LEGISLATIVE ACTION, WE MUST BE CAREFUL TO FULLY UNDERSTAND THE IMPACTS IT WILL HAVE ON THE AFFECTED INDUSTRY AND THE REGULATORY SYSTEM.

I LOOK FORWARD TO HEARING FROM OUR DISTINGUISHED PANEL OF WITNESSES TODAY TO EXPLORE THIS IMPORTANT ISSUE.

OPENING STATEMENT
BY U.S. REP. JERRY COSTELLO, ILLINOIS
SUBCOMMITTEE ON SURFACE TRANSPORTATION
"NEGOTIATED RATES IN THE TRUCKING INDUSTRY"
JULY 19, 1990

Mr. Chairman, I am pleased to be here today to investigate an important issue which has become even more urgent in light of a recent Supreme Court decision, Maislin Industries, U.S. Inc. v. Primary Steel, Inc. Specifically, we need to take a look at the problem of negotiated rates in the shipping industry. The decision rendered by the Court, which stated that only those rates which are filed with the ICC are valid, could cause a great deal of disruption in that industry, since in many cases, carriers did not file the lower negotiated rate. Recently, as many carriers have gone bankrupt, their auditors have looked at rate records to determine whether underpayments have occurred. When they see that the shippers have paid a lower (negotiated) rate than the filed rate, they demand a payment of the difference. The Supreme Court has just upheld their right to do so. This would seem patently unfair to the shippers, since it was the carriers who failed to file the agreed upon rate.

The Court indicated that it was the role of Congress to shape new legislation to address this situation. It is incumbent upon us, as members of the Surface Transportation Subcommittee, to look closely at the decision and see what measures are necessary to return fairness to rate-setting procedures. I look forward to examing H.R. 3243, introduced by the Committee leadership; since this legislation was written prior to the *Maislin* decision, we also need to determine whether changes are needed to address the situation. I look forward to hearing the testimony of our distinguished witnesses, and hope that we can act quickly to avoid disruption in the shipping industry and maintain the benefits of deregulation. Thank you, Mr. Chairman.

Mr. MINETA. Any other members who would like to make an opening statement?

Mr. Jones.

Mr. JONES. Thank you, Mr. Chairman.

I want to thank you for holding this hearing to examine the negotiated rate problem in the motor carrier industry. The Supreme Court has kicked this problem back to Congress with its decision in *Maislin Industries U.S., Inc.,* v. *Primary Steel, Inc.,* and I commend the chairman for holding this hearing so promptly following the Maislin decision.

The court held that only Congress has authority to make exceptions to the filed rate doctrine. The court discarded the concept relied upon by the ICC that in certain circumstances collection of the filed rate would be an unreasonable practice and thus not allowed. Since the Supreme Court's decision, I have heard from carriers in Georgia who are being sued by collection agencies based on the filed rate doctrine.

A company in Georgia, the General Wholesale Company, conducted some shipments in 1983 through 1985 with a family-owned trucking company, known as Claxton Transport, Inc. Claxton Transport quoted General Wholesale a competitive shipping rate, conducted the shipments, billed General Wholesale, and was paid in full. In December 1985, Claxton Transport went bankrupt.

A collection agency is now suing General Wholesale for the alleged differences between the agreed shipping rate that was billed and paid and the tariff rates supposedly on file at the ICC. The alleged difference amounts to thousands of dollars. It is especially disheartening because the collection agency had nothing to do with the original transactions.

General Wholesale had the case referred to the ICC, which declared that collection of the alleged undercharges would constitute an unreasonable practice in violation of the Interstate Commerce Act. The ICC, though, cannot enforce this decision because of the *Maislin* decision. After the *Maislin* decision, the collection agency has moved quickly to force General Wholesale to pay $30,000 for the alleged differences. Another Georgia shipper is being sued by the same collection agency for $100,000.

Mr. Chairman, I'm a co-sponsor of H.R. 3243 introduced by our chairman with bipartisan support. H.R. 3243 would solve this problem by allowing the ICC to enforce its decision that an unreasonable practice has occurred. I hope we can send H.R. 3243 to the President before the 101st Congress adjourns, and I urge our committee to quickly report this legislation for consideration by the full House.

Thank you, Mr. Chairman. Thank you for having these hearings.

Mr. MINETA. Thank you, Mr. Jones.

I'd like to also enter into the record an opening statement by the chairman of our full Committee on Public Works and Transportation, Chairman Anderson.

[Mr. Anderson's prepared statement follows:]

# STATEMENT OF
# CHAIRMAN GLENN M. ANDERSON
# COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
# FOR HEARING ON JULY 19, 1990 ON H.R. 3243

I want to congratulate Chairman Mineta on scheduling these hearings on this important issue. Ten years ago the Committee took action to reform the regulatory structure of the motor carrier industry. Those reforms were sweeping and they were monitored closely by the Committee with a view to making future changes that might be needed.

Everyone in this room knows what the negotiated rate problem is. Everyone should know that I am angry about the blatant disregard for Federal regulatory laws and the questionable pricing practices that have occurred. Certainly, somewhere in the scope of sensible and fair regulation, there must be a way to make people responsible for rates they quote.

Carrier and shipper groups first brought the problem to my attention, several years ago. In June of 1989, the National Industrial Traffic League, the American Trucking Associations, the National Small Shipments Conference, the Regular Common Carrier Conference, the National Association of Manufacturers, the Transportation Brokers Conference of America, and the Health and the Personal Care Distribution Conference formally requested that legislation be introduced and enacted to address the problem.

The Committee leadership all received the same request and I introduced H.R. 3243, with Congressman Hammerschmidt, Mineta and Shuster as cosponsors. Clearly, we felt that hearings should be held after the Supreme Court made a decision in a case pending before it.

On June 21, the Supreme Court made its decision. I believe our job now is to find out how to address the problem in light of the Court's decision. I look forward to hearing whether the witnesses still believe that H.R. 3243 is or is not the answer.

In closing, I hesitate to place blame for the mess that has been created by practices that at best manifest negligent disregard for the Nation's regulatory laws; however, I cannot subscribe to any conclusion that says no one is at fault.

The problem needs to be addressed. The problem needs to be resolved. I anticipate that creative solutions to the problem will be offered, today.

I will close by saying that an acceptable solution must also be one that will be crafted to prevent a recurrence of what I consider an outrageous situation.

Mr. **Mineta**. We're pleased to have our very fine colleague to start off this morning's witness list, the Honorable Congressman James Traficant of Ohio.

Congressman Traficant, your full statement will be made a part of the record, so if you would go ahead and proceed in your fashion.

## TESTIMONY OF HON. JAMES A. TRAFICANT, JR., A REPRESENTATIVE IN CONGRESS FROM OHIO

Mr. **Traficant**. Thank you, Mr. Chairman and members of the committee.

This past Monday, Chairman Anderson and the committee were in Youngstown, Ohio, to hold hearings relative to infrastructure needs, and one of the individuals testifying there was a representative of the B.J. Alan Company, a company that has suffered a great loss in revenue because of a decision made by UPS not to transport certain Class C fireworks. It has jeopardized the revenue of this company, almost cutting it in half, by forcing them to pay more for transportation at times than what their product is worth, thus almost destroying their business.

I want to say today just briefly, since you have the statement, today we're being called upon to fix a mess that results from the failure of the ICC to accept the fact that Congress did not choose to deregulate the motor carrier industry in 1980. I want to make it clear that even if we enact the proposed legislation discussed here today, we approve of the Supreme Court's reasoning in *Maislin Industries U.S., Inc.,* v. *Primary Steel.*

Plainly, the court's holding boils down to the simple statement that administrative revision of long-standing principles and interpretations of the act, such as the filed rate doctrine and the common carrier obligation, is not permissible and should not be tolerated. If changes are to be made in these or other long-standing principles, it's the responsibility of Congress to make those changes.

I think it should be made clear that the committee will not sit on the sidelines and let this go forward while the Commission will continue to make changes in the regulatory system and what appears to be evident overturning of long-standing precedents, especially when those precedents begin to harm constituents such as mine, in this case the B.J. Alan Company, a major employer in my area that suffered tremendous economic problems to boot.

The gross sales of the firm, B.J. Alan, have fallen from $23 million in 1987 to $11 million this past year. A firm that is the largest producer and seller of class C fireworks in America, once robust and moving, was hit by a decision by UPS that they just arbitrarily wouldn't ship anymore. Employment at my constituent's facility was reduced over this period of time by 50 percent. In 1987, it employed over 400 individuals. This year, employment was under 200.

This is in a district where one out of five people is on Social Security, 22 to 25 percent are on welfare, 10 to 15 percent unemployed, and how many underemployed? And yet the Commissioners took it upon themselves to set precedent and make decisions that surely were in the province of Congress here. I think that's an example of what happens when policies are changed by the ICC that were established by Congress and fall in the province of Congress, and I think as members we should be questioning that process very seriously.

My constituent is not the only company that was harmed, Mr. Chairman. Small fireworks companies from California, Florida, the Dakotas, Alabama, and all through our heartland, are at this very minute facing what even could be bankruptcy by that decision not to transport those products. I think it's time that we let the ICC know, Mr. Chairman, that this is wrong, that Congress did not intend for them to take that action!

I have talked with committee staff and counsel, and I want to apprise the committee that they are meeting with attorneys and are meeting with the ICC, but if there is a position of hardball here, you're going to have companies that are really held hostage to a decision-making process that I believe was not the process Congress wanted implemented. And with that, I ask the committee to keep those facts in mind as it reviews this legislation, as legislative history is set relative to the language that finally comes out and that issue of concern and harm clearly detrimental to small companies around the country, as evidenced by the case with B.J. Alan Company of Youngstown, Ohio, be considered in that process, Mr. Chairman.

Mr. MINETA. Very well. Thank you very much, Congressman Traficant, for your very fine statement. I'm wondering what reasons are being advanced by either UPS or other carriers for not providing services to B.J. Alan?

Mr. TRAFICANT. At this particular point, it seems to appear to be the fireworks aspect of the matter. Even though we're talking about Class C fireworks, sparklers and other types of non-dangerous and licensed salable goods, somewhere they have just taken that particular position. I think it's coupled with other economic factors that they probably also hold, but that seems to be one of the major arguments in the case.

Now, here's a company, for example, in my area that set the packaging standards for all of America. They have the patent, I think, on the packaging, how these things are packaged, how they're sold, how they are protected for safe shipment. But when UPS says, "Look, we're not going to deliver these things anymore," it forces them to go another route. They have to pay much more to have them shipped than what the value of their product is, almost negating and crippling their business.

Mr. MINETA. Are these the kinds of fireworks that you find, let's say, prior to the Fourth of July that the VFW or the Little League are selling, or are these the commercial types that you might see that are really for the fireworks display at the Mall?

Mr. TRAFICANT. They would not be the kind that would be exploding over the Mall. These would be the hand-held sparklers that the families might be using at their Fourth of July reunion or picnic, and they are class C. By the nature of that, they are nonvolatile, they are not considered to be dangerous. It does pose questions, and it does pose, I think, specific language and delineation that perhaps the committee should address. But clearly falling within that scope of class C fireworks and the structure that's placed around it, in my opinion, they should not pose that type of a shipping problem. They were being shipped before without incident.

Mr. **Mineta**. Thank you very much.

Mr. Emerson.

Mr. **Emerson**. I have no questions.

Mr. **Mineta**. Mr. Jones.

Mr. **Jones**. No questions, Mr. Chairman.

Mr. **Mineta**. Mr. Hancock.

[No response.]

Mr. **Mineta**. Mr. Lipinski.

[No response.]

Mr. **Mineta**. Mr. Skaggs.

[No response.]

Mr. **Traficant**. Mr. Chairman, I just ask for your consideration to take a look at this particular matter. Again, the counsel from the company and the counsel for the respective parties is meeting under the overall guidance and cognizance of the Public Works Committee, but I ask your subcommittee to look into the matter.

Mr. **Mineta**. Very well. Thank you very much.

Mr. **Traficant**. I appreciate your time.

[The prepared statement of Mr. Traficant follows:]

REMARKS OF REPRESENTATIVE TRAFICANT with respect to HR 3243

Today we are being called upon to fix a mess that results from the failure of the Interstate Commerce Commission to accept the fact that Congress did not choose to deregulate the motor carrier industry in 1980. I want to make it clear that even if we enact the proposed legislation, we approve of the Supreme Court's reasoning in Maislin Industries, U.S., Inc. v. Primary Steel. Plainly, the Court's holding boils down to the simple proposition that administrative revision of long standing principles and interpretations of the Act, such as the filed rate doctrine and the common carrier obligation, is not permissible and will not be tolerated. If changes are to be made in these, or other long-standing principles, it is the responsibility of Congress to make the change. As I will elaborate, it is telling that in two recent instances, the ICC has decided to ignore Congressional policies and to follow its own initiatives. In both instances, shippers have ultimately paid the price.

The majority's "negotiated rate" policy, and its recent attempt to modify the common carrier obligation, would resurrect an administrative discretion that Congress was determined to abolish. We must not forget that one of the major purposes of the 1980 Act was to put a halt to the ICC's deregulation initiatives of the 1970's and its administrative overruling of long-standing precedents. During the House debates, Representative Harsha, ranking Republican Member of the Committee on Public Works and a sponsor of the Act, explained:

> For too long, Congress has basically been on the sidelines, while the [ICC] exercised unduly wide discretion in regulating the Nation's motor carrier industry. . . [I]n the past several years, [the ICC] has made changes in the regulatory system on its own initiative and in the absence of congressional guidance, if not consultation.
>
> The [1980 Act] will correct that situation, for clearly it was never the intent of Congress that an unbridled Federal bureaucracy would control and set policy and guidelines for the conduct of interstate commerce. If long-standing precedents in the regulating of the motor carrier industry are to be overturned, as some have been recently, it must only be done in accordance with congressional intent, and not in a show of agency independence.

126 Cong. Rec. 15585 (1980) (emphasis added).[1] That same message has been repeated in the Maislin decision. I want to make it clear that this Committee will not sit on the sidelines while the Commission continues to make changes in the regulatory

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[1] Similar criticisms and concerns were voiced by each of the bill's primary sponsors and by others who wished to bring an end to the ICC's attempts during the late 1970's to deregulate the trucking industry. See 126 Cong. Rec. 15583 (Representative Howard, Surface Transportation Subcommittee Chairman) ("it was incumbent upon the Congress to act and for it to determine the policies that govern the regulation of the trucking industry"); id. at 15591 (Representative Shuster, ranking Republican member of the Subcommittee) ("Without this compromise, without this legislation, the ICC, the bureaucrats downtown, would proceed to deregulate the trucking industry"); id. at 15629 (Representative Clausen) ("we cannot afford to leave total discretion to an agency of an administration which has decided before any hard experience data has been collected that small communities will not lose service and will not experience inordinate price increases"); id. at 15641 (Representative Johnson, Committee Chairman, Public Works and Transportation) ("The Interstate Commerce Commission needed congressional direction in formulating policies for the country's major transportation industry. It now has it, and the committee and the Congress fully intend that the Commission will carry out that policy").

system and overturns long-standing precedents, especially when those changes harm my constituent.

This past Monday, the Public Works Committee met in Youngstown, Ohio. During that hearing, my constituent testified that as a result of the Commission's modification of the common carrier obligation, its gross sales revenues have fallen from $23 million in 1987, to only $11 million this year.

In addition, as a result of the ICC's decision, employment at my constituent's facility was reduced over 50%. In 1987, it employed over 400 individuals. This year, employment was under 200 individuals. This is in a district where unemployment is rampant. If that is an example of what happens when the ICC changes policies that were established by Congress, I don't want to have anything to do with them.

Since fireworks companies from California to Florida and Maryland, from the Dakotas to Alabama, from America's heartland - Wisconsin, Ohio, Pennsylvania, Indiana and Missouri - have all suffered as a result of the Commission's modification of the common carrier obligation, we will no doubt be called on to take remedial steps. While I and other members of this Committee will do everything possible, either through new legislation or through oversight, to require the Commission to return to the traditional common carrier obligation standards, I would hope that such an effort will not be necessary.

In 1980, we could have overruled the old common carrier obligation precedents and completely deregulated the motor carrier industry. We did not do so! Therefore, we expect the ICC to continue to follow longstanding interpretations of the Act until we make the changes which are shown to be necessary. As was stated in the House Report which accompanied the House bill:

> Congress . . . intends to give the [ICC] explicit direction for the regulation of the motor carrier industry and to ease that industry's uncertainty about the future of regulation by the Commission. The Commission is admonished to stay within the powers specifically vested in it by the revised law.

H. R. Rep. No. 1069, 96th Cong., 2d Sess. 10-11 (1980). See also S.Rep. No. 641, 96th Cong., 2d Sess. 3 (1980).

Moreover, Rep. Harsha "highlight[ed]" as "extremely important" the "Congressional Findings" set forth in § 3 of the 1980 Act. As he explained, § 3 "clearly states our intent that the ICC comply with, and not go beyond, the explicit directions given to it by Congress." 126 Cong. Rec. 15585 (1980). Section 3 (94 Stat. at 793) provided, inter alia, that:

> [T]he [ICC] should be given explicit direction for the regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; . . . the [ICC] should not attempt to go beyond the powers vested in it . . . .

I see no justification whatsoever for the alteration of the common carrier obligation. In fact, various members of this Committee explicitly stated that they intended to preserve the common carrier obligation. Furthermore, their comments withdrew from the ICC any discretion to expand the "eased entry" provisions of the 1980 Act into further deregulation measures based on ICC "policy." As Representative Howard, the Chairman of the Surface Transportation Subcommittee explained:

> None of these provisions [of the 1980 Act "which provide for increased entry opportunities and removal of wasteful operating restrictions"] eliminate or weaken the carriers' obligation to perform the service they are authorized to perform under their certificate.

126 Cong. Rec. 15,583 (1980). Likewise, Representative Shuster, ranking Republican Member of the Surface Transportation Subcommittee, emphasized that

> this bill keeps the common carrier obligation to serve. It does not touch that. It keeps that. And that is fundamental.
>
> As Representative Shuster also stated:
>
> [T]here is no intent, that in granting the ICC authority to remove unreasonable and excessively narrow restrictions, to extend to the Commission the authority to change substantially the character or pattern of service provided by any carrier.

126 Cong. Rec. 15639 (1980). As should be obvious, the Supreme Court in Maislin has merely echoed these concerns which had already been voiced in Congress ten years ago. Unfortunately, the ICC didn't pay attention.

Despite the above, the Commission has recently adopted a revised definition of the common carrier obligation that, for the first time in history, leaves it to the carrier's discretion whether it will provide service to the full extent of its existing capacity, even though it discriminates against a small group of shippers. I want the record to reflect that this Committee regards the Commission's attempt to emasculate the common carrier obligation and disregard discriminatory service to be in the same category of discredited initiatives as the Negotiated Rates policy.

In the case to which I am referring involves the American fireworks industry. The ICC, under its former Chairman, deliberately ignored the express Congressional intent to preserve the common carrier obligation. In its decision, the majority cited no specific provision of the 1980 Act or its legislative history to support its modification of the common carrier obligation. Instead, it relied on the ICC's "overall regulatory policy" and reasoned that reduced entry barriers and resulting competition under the 1980 Act permit further deregulation by relaxing the carrier's obligation. This is the same reasoning which the Supreme Court rejected in Maislin. Therefore, I want it understood that, consistent with Maislin, we regard the ICC's decision to modify the traditional common carrier obligation to be erroneous and contrary to the intent of Congress.

Finally, we now learn that shippers are concerned about potential undercharges of over $200 million. I can only ask why carriers suddenly stopped filing tariffs. The tariff system had worked for over 40 years in the motor carrier industry and over 100 years in the rail. Upon what authority did the ICC act when it relaxed the tariff filing requirements. Clearly, the ICC was given no "explicit direction" to depart from the filed rate doctrine, just as it had no authority to abandon the common carrier obligation. While I can perhaps see the justification for the Negotiated Rates policy given the hardships that resulted, I fail to understand why the ICC encouraged carriers to diminish the importance of filing tariffs in the first instance. In 1980, we certainly did not amend the sections of the Act which require tariffs. In fact, I am not aware that Congress even mentioned the filed rate doctrine during the course of considering the 1980 Act. Thus, the ICC itself is to blame for the current problem.

Mr. Chairman, that is disgraceful. I for one want to leave no doubt in anyone's mind that I expect the Commission in the future to abide by the intent of Congress. Had that been done, we would not be here today. I trust that the newly appointed Commissioners will understand my concerns and take immediate action to cure the problems that their predecessors have created so that Congress can be spared the task of cleaning up the mess that results when Commissioners do not faithfully follow the intent of Congress.

Mr. **Mineta**. We now have as a witness the very distinguished chairman of the Interstate Commerce Commission, Mr. Edward J. Philbin, who is a recent appointee, and we're honored by having him at this subcommittee as, for us anyway, his first appearance.

Chairman Philbin, your statement will be made a part of the record, so if you would go ahead and proceed in your own fashion.

## TESTIMONY OF EDWARD J. PHILBIN, CHAIRMAN, INTERSTATE COMMERCE COMMISSION, WASHINGTON, DC

Mr. **Philbin**. Good morning, Mr. Chairman and members of the subcommittee.

Thank you for the opportunity to present the views of the Interstate Commerce Commission concerning negotiated rates for interstate shipments via motor common carriers of property. The June 21, 1990, decision of the U.S. Supreme Court in *Maislin Industries U.S., Inc.,* v. *Primary Steel, Inc.*, has focused considerable attention on this issue. That decision struck down the Commission's policy of relieving shippers of the obligation to pay filed tariff rates where carriers had failed to file lower tariffs reflecting the rates negotiated with, billed to, and paid by the shippers.

While the Supreme Court has thus addressed the legal authority of the Commission's decision, the Commission continues to believe that the equities of this situation clearly favor the shippers. The Commission is therefore supportive of a legislative remedy for the problems faced by the shipping community in the wake of *Maislin* and stands ready to provide whatever support is needed to assist the subcommittee in deliberations on these issues.

In this regard, we are recommending several changes to the bill, described in our written testimony, to make it clear that the Commission would have jurisdiction to determine that application of tariff rates or charges is unlawful where the Commission finds that the carrier has engaged in an unreasonable practice by attempting to collect rates in addition to those originally negotiated, billed and collected.

The statutory and regulatory framework of the negotiated rates issue is straightforward. Motor common carriers are required by 49 U.S.C. 10761 to file tariffs setting forth charges for all transportation services and to collect only the published tariff rates. The Interstate Commerce Act also contains a requirement in 49 U.S.C. 10701 that carriers' practices be reasonable.

Prior to 1980, the tariff filing requirement of section 10761 was applied strictly. In a series of cases decided under the Interstate Commerce Act in the early part of this century, the Supreme Court developed principles that later became known as the filed rate doctrine. That precept dictates that when a carrier files an action in court seeking to recover unpaid tariff charges, the court may not entertain any defense based on the carrier's misquotation of the tariff rate or the shipper's ignorance of that rate. A primary purpose of the filed rate doctrine, as enunciated by the Supreme Court, was the reinforcement of the statutory prohibition against rate discrimination.

The 1980 enactment of the Motor Carrier Act substantially revised the transportation policy of the United States by encouraging a more competitive environment in the motor carrier industry. That act significantly relaxed restrictions on entry into the motor carrier industry and permitted carriers to operate as both common carriers and contract carriers, thereby enabling carriers to tailor rates to meet the needs of individual shippers.

In this atmosphere of eased entry, vigorous price competition ensued. The Commission responded by changing its tariff regulations to permit rate reductions on one day's notice and to allow carriers to establish rates for named shippers. As a consequence of these changes, it became common practice for carriers and shippers to negotiate the rates charged for particular transportation services.

Typically, carriers and shippers agreed upon a rate and other pertinent terms and conditions, the shipper tended freight to the carrier in reliance upon the agreed terms, and the carrier billed the shipper and received payment at the negotiated rate. Some motor common carriers, however, did not always comply with the statutory tariff filing requirements. As long as the carrier remained a going concern, these derelictions generally went unnoticed.

However, when a carrier filed for bankruptcy, the receiver or trustee frequently retained an auditor to search the records of the carrier for instances in which the rates billed and collected were lower than the applicable rates on file at the ICC. When these discrepancies were discovered, the receiver or trustee then filed a collection action to recover the difference from the unsuspecting shipper.

Rising numbers of motor carrier bankruptcies in recent years, as well as multiple claims attributable to individual carriers, increased significantly the number of collection actions. As these actions to recover unpaid tariff charges on behalf of bankrupt carriers became more common, shippers requested that the ICC address the problem, and in response the ICC adopted two policy statements designed to address the practice of carrier failure to file negotiated rates.

Although the filed rate doctrine prohibited courts from considering equitable defenses to carrier undercharge actions, the Commission concluded that the doctrine did not preclude the ICC from exercising its regulatory powers to ensure that carrier billing practices were reasonable. The Commission announced that in carrier actions to collect unpaid tariff charges it would conduct an advisory analysis on referral from a court to determine whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice and, if a negotiated rate were found to exist, whether this amount was all the carrier should be permitted to collect.

The Commission reiterated the duty of carriers to charge the tariff rate but explained that an inflexible policy of enforcing the filed rate when a carrier had negotiated a lower rate with a shipper but had failed to file that rate in the tariff would frustrate the intent of Congress as expressed in the national transportation policy to encourage pricing innovation, since it could chill rate negotiation between shippers and carriers and inhibit legitimate pricing initiatives.

The *Maislin* case followed this general pattern. The carrier, Maislin, made about 1,100 shipments of steel for the shipper, Primary Steel, under rates negotiated with Maislin. Maislin never filed these rates with the Commission, despite an understanding that it would do so. Following Maislin's bankruptcy, an auditor appointed by the bankruptcy court claimed that Maislin's actual filed tariff rates were higher than the rates charged to Primary, and Maislin brought suit in the Federal District Court to recover about $185,000 in alleged undercharges.

The court referred the dispute to the Commission, which found that Maislin's solicitation and billing practices were unreasonable and determined that Primary should be required to pay additional charges for the differences between the lower negotiated rates and the higher tariff rates. The District Court grant summary judgment in favor of Primary, and the Court of Appeals for the Eighth Circuit affirmed.

The Supreme Court granted certiorari and issued its opinion on June 21, 1990, holding that the Commission's negotiated rates policy was inconsistent with the Interstate Commerce Act and is therefore invalid. The majority concluded that the Commission's justification for authorizing this departure from the filed tariff schedule was contrary to the language and structure of the statute as a whole and the requirements of the filed rate doctrine in particular.

The effect of the Supreme Court's decision is far-reaching. As of June 28, 1990, the Commission had 105 claims pending before it with a dollar value of over $4.8 million. Forty-five cases are being held in abeyance at the request of the parties, and the record is not yet closed in 31 cases. The balance are in some stage of preparation or in the voting process, which has now been suspended.

The Maislin decision precludes the Commission from applying an unreasonable practices theory to resolve the cases pending before it. Furthermore, these cases represent only a fraction of the potential negotiated rates claims that could be brought The Commission is unable to identify all potential claims which may not yet have been brought in Federal District Court or, if brought, may not yet have been referred to the Commission. However, the trade press estimates that the total universe of claims could total as much as $200 million.

The Supreme Court left open the possibility that the Commission could find that the tariff rate was unreasonable and thereby preclude the carrier or the bankruptcy trustee from collecting the difference between the filed and the negotiated rate. However, this approach may prove unworkable for several reasons. Since 1980, motor carrier industry rates have been disciplined through competition, not through regulatory standards. Thus, this approach seems inconsistent with the concerns expressed by Congress in enacting the Motor Carrier Act of 1980, which was intended to provide for less Government regulation and to spur competition in both service and pricing.

Practical considerations also mitigate against the rate reasonableness approach. Individual determinations of reasonableness would be required for each tariff rate in question, and as a result shippers would have to undergo the considerable expense of litigating each of these rates before the Commission.

In the Commission's view, the equities of this situation lie with the shippers who thought that they had entered into binding arrangements with carriers for transportation services but who are nonetheless, after *Maislin,* held strictly liable for any difference between the filed and the negotiated rates. However, as the Supreme Court noted, equitable defenses, that is, those based on carriers' failure to file the negotiated rate, cannot be asserted in an action to recover on the basis of the filed rate. The prospect of successful administrative or judicial proceedings to protect shippers' interests thus appears uncertain at best, and any such proceedings will be costly to the litigants.

The Commission, therefore, recommends that remedial legislation be enacted as quickly as is feasible. The Commission supports the approach taken in H.R. 3243, which clarifies the existence of the Commission's primary jurisdiction to determine whether motor carrier and freight forwarder solicitation and billing practices are unreasonable and therefore unlawful under the Act.

As our written testimony indicates, we believe several modifications to the text are needed for the bill to provide an effective resolution to pending and potential claims. The Commission's expression of support is not an endorsement of additional regulatory authority or a suggestion that new policies by adopted. I personally view this proposal as an additional expression of the goals emphasized in the Motor Carrier Act of 1980 which directed the Commission to promote competitive and efficient transportation services.

I understand that the Department of Transportation also supports legislation and offers several other options involving decreased economic regulation such as the possibility that only collectively set rates would be filed with the Commission. I believe such options could also provide solutions to the negotiated rates problem, and the subcommittee may wish to consider them either in the context of the issue before it today or in the future.

Mr. Chairman, that concludes my statement. If there are any questions, I would be happy to attempt to answer them.

Mr. Mineta. Very well. Thank you very much, Chairman Philbin.

I see that our very distinguished chairman of the full committee has just come in. Mr. Chairman, your statement has been a part of the full record; however, if you wish to go ahead and make your presentation at this time, we would be more than pleased to have you make your opening statement at this point.

Mr. Anderson. First, I want to congratulate you on your recent—congratulate Mr. Philbin, rather, on your recent appointment as chairman of the ICC and to welcome you on your first appearance before this subcommittee. That's the good news. The bad news is that several witnesses are going to say that the negotiated rate problem should be laid at the ICC's doorstep. In other words, that the ICC is responsible for the mess. Now, how do you respond to that?

Mr. Philbin. Well, I hadn't heard that before, sir, and frankly I don't see how that could be in this case.

Mr. Anderson. I see. Now, some supporters of H.R. 3243 are seeking to place a limit on the provisions of the bill contained in section 1. They would restrict the remedy in section 1 to pending claims and to claims arising only up to 18 months after the date of enactment. Now, what do you think about such a limitation?

Mr. Philbin. Well, I think in general terms any statute of limitation should be relatively short; however, if the intent of the limitation is to remove any remedial legislation from the books after 18 months, I would suggest to the subcommittee that that's not a good idea. This problem may very well arise again in the future, despite the fact there has been extensive public information as to the existence of the problem.

New people will enter the industry, people forget, people get sloppy in their business practices, and I would foresee that these cases would arise again in the future after 18 months, and I would suggest that leaving the authority with the Commission on the books would be a useful tool for the Commission to solve similar problems in the future.

Mr. Anderson. Thank you, and, again, congratulations.

Mr. Philbin. Thank you very much, Mr. Chairman.

Mr. Mineta. Mr. Chairman, your statement indicates that resolution of the problem by using the rate reasonableness approach in litigation before the Commission would be costly to shippers. Is the Commission able to handle this type of workload, and how long would it take to dispose of those cases that you mentioned that are now pending before you?

Mr. Philbin. The cases pending before us would take a period of time, but if the information in the trade press that the entire problem is in the range of $200 million is accurate, we are probably talking about thousands of cases that have not yet been identified. With the resources the Commission has, we would have to take each one of those cases one by one and litigate them. These are basically cases which depend on the individual evidence in the case, and it would take a considerable period of time, probably on the order of years, to get through thousands of those cases, and this would probably interfere with the normal flow of business that the ICC is now conducting.

Mr. Mineta. Would you venture a guess on the years?

Mr. Philbin. I would estimate two or three years just to clear up the cases that might be identified at this point.

Mr. Mineta. How do shippers know or how can a shipper find out if a rate has been filed with the ICC?

Mr. Philbin. Well, a shipper can call our Tariff Bureau and ask for the help of one of our tariff people. That is done on occasion, but normally those people are so busy they cannot take the time to satisfy the requirements of an individual requesting information, and normally they would suggest that they go to a tariff watching service to do that.

Although these tariffs could be filed at the Commission, it normally takes two or three days to get them actually filed in our archives, so there could be a lag between the actual filing and the time that they would be in a position where the tariff personnel could in fact find the individual tariff, so it is something of a problem for a shipper calling in for information to get that information in a timely fashion.

Mr. Mineta. Is there a way to correct that?

Mr. Philbin. Well, one of the things that could be done is to try and develop an electronic filing system, as has been done by the FMC. There are over a million filings per year at the ICC, each one of which contains on an average of about five pages. That is far more than is filed with the Federal Maritime Commission, who, after five to six years of study and development and the expenditure of $5 million to $6 million, are just now entering a pilot program for electronic filing. Once that electronic filing is underway at the FMC, it will cost $1 million a year to keep it going.

Mr. Mineta. In the last sentence of your testimony, you make an interesting observation. Why do you suggest that the legislative history of H.R. 3243, if it is enacted, reflects that the bill is meant to clarify existing law rather than to make a substantive change?

Mr. Philbin. Primarily because the Supreme Court put in question whether the enactment of the Motor Carrier Act was really intended by the Congress to ameliorate the harshness of the filed rate doctrine. In my viewpoint, in looking at the legislative history of the Act, and also in the viewpoint of Justice Stevens and the Chief Justice who filed the dissent in the *Maislin* case, the enactment of the Motor Carrier Act of 1980 was intended to create a sea change in the way that motor carrier transportation was regulated.

There was to be heavier reliance on price competition and ease of entry rather than on Government regulation of the rates, as it had been in years past. It seemed to Justice Stevens and the Chief Justice that the filed rate doctrine, as enunciated by the majority of the Supreme Court, is an anachronism in the current environment. It strikes me the same way, and therefore Congress is well within its legislative authority to clarify that it did intend to ameliorate the filed rate doctrine when it passed the Motor Carrier Act.

Mr. Mineta. Does the ICC have any constitutional problems with applying H.R. 3243 to pending claims, and is this why you make this statement about clarifying existing law rather than to make a substantive change in order to keep away from any problems involving retroactivity?

Mr. Philbin. The Office of the General Counsel has done the constitutional analysis and has concluded that there is no constitutional problem with H.R. 3243. I have read that analysis very carefully and I agree with the General Counsel. We do not see any constitutional problem in enacting this legislation.

Mr. Mineta. And that you would be able to apply it to pending claims?

Mr. Philbin. Yes, sir, we would.

Mr. Mineta. Do you know if any other industry has the equivalent of a filed rate doctrine?

Mr. Philbin. Yes, sir, the Federal Maritime Commission has a strict filed rate doctrine which we followed when I was a member of that Commission. Some of the regulated telecommunications industries follow the filed rate doctrine, and some of the regulated pipeline industries also follow that doctrine. The doctrine is very old, and it's very clear-cut, but it was developed in a time of massive Government regulation of rates and practices.

Public policy behind it was to avoid discrimination between consumers by the regulated party, but the environment has now so changed that the filed rate doctrine, as the dissenters in the Supreme Court pointed out, doesn't seem to serve a real purpose anymore, except to create problems such as the one we are facing here today.

Mr. MINETA. Thank you very much.

Mr. Emerson.

Mr. EMERSON. Thank you, Mr. Chairman.

Mr. Philbin, without legislation, is the Commission going to reverse past practices and begin to enforce the filed rate doctrine against carriers?

Mr. PHILBIN. That is the dictate of the Supreme Court in the *Maislin* case, yes, sir.

Mr. EMERSON. So you are going to proceed to do that if we don't pass legislation?

Mr. PHILBIN. We will have no alternative.

Mr. EMERSON. Do you think that most shippers, even small ones, are able and willing to check the carriers' tariff filings to protect themselves from the consequences of negotiated but unfiled rates?

Mr. PHILBIN. Well, I'm sure that in the future the big shippers, the Duponts, the General Motors, will certainly do that, but there are many small shippers out there, small businesses, Mom-and-Pop operations, who may not have even been aware of this problem and may not be aware of it now, and, certainly, if they were aware of it do not have the resources to do that.

Mr. EMERSON. Wouldn't they be aware of it through some industry network or association or something?

Mr. PHILBIN. If they were large enough to be members of such an association.

Mr. EMERSON. Is this not pretty well-known out there throughout the industry, large or small?

Mr. PHILBIN. I would say that the large and medium size shippers would certainly be aware of it. I have some doubts about the smaller shippers.

Mr. EMERSON. Don't most shippers routinely do regular audits of the tariff filings to look for overcharges?

Mr. PHILBIN. We can supply that for the record.

Mr. EMERSON. Well, if you have the information on that point, we'd appreciate your supplying it for the record.

Mr. PHILBIN. I'd be happy to do that, Mr. Emerson.

[The information follows:]

Commission staff contacted fourteen freight traffic consultants and/or rate auditing firms, as well as the National Association of Freight Traffic Consultants, in an effort to ascertain the extent to which small shippers utilize their services

Freight traffic consultants advise shipper clients on transportation matters such as pricing, type of service, logistics, distribution, warehousing, and other transportation functions. Rate auditing firms primarily audit shipper freight bills after the transportation has been performed to determine if the shipper paid the correct rate as filed with the ICC. They also provide other services such as handling overcharge claims with carriers on behalf of shipper clients. Rate audit firms most often work on a contingent basis, charging a fee for their service only if the freight charges are found to be less than the carrier collected. The fee is usually one-half of the amount recovered by the shipper.

In staff discussions with these organizations it was found that for the most part, small and medium sized shippers account for approximately 50% to 90% of the traffic consultants' clients. While large firms have the resources to audit their own bills, small and, to a lesser extent, medium sized shippers do not. We were advised that small companies frequently have no understanding nor knowledge of tariffs and what they mean. They pay the freight bills that are presented to them, as they do not have time to investigate rates nor the knowledge to verify rates. The rate audit firms believe that small shippers will be unaffected by the Supreme Court's decision in *Maislin*, because these shippers do not have sufficient traffic available to negotiate rates as do large shippers. However, Commission staff have been advised that some small shippers received discounts, and have received balance due bills for undercharges.

Mr. EMERSON. Is it unfair for Congress to disqualify carriers from making claims against shippers for tariff undercharges while shippers continue to have the benefit of collecting overcharges from carriers?

Mr. PHILBIN. I would say that the legislation should certainly be even-handed. I see no problem with that at all.

Mr. EMERSON. Should treat all parties with an even hand?

Mr. PHILBIN. Absolutely.

Mr. EMERSON. Thank you, Mr. Chairman.

Mr. MINETA. Mr. Rahall.

Mr. RAHALL. Thank you, Mr. Chairman.

Mr. Philbin, just so I understand this completely, the filed rate doctrine that dictates when a carrier files an action in court seeking to recover unpaid tariff charges, that has come about as a result of the Motor Carrier Act of 1980. Is that correct? The whole practice of entering into these negotiations?

Mr. PHILBIN. The Motor Carrier Act and the filed rate doctrine, which was developed during a totally different regulatory environment.

Mr. RAHALL. But during this whole time, the ICC still had published tariff rates. Is that accurate?

Mr. PHILBIN. Yes, sir. We still must.

Mr. RAHALL. I heard your response to Chairman Anderson's question earlier about whether the ICC is at fault for this whole dilemma today or not. I guess what I'm really wondering is, if these tariffs had been enforced during this whole period, would we still be facing the problem that we are today?

Mr. PHILBIN. Well, I'm not sure I understand what you mean by enforcement, but if by that you mean could we have gone out and forced every motor carrier company to file every tariff they should have been filing, I would say it was not possible for the agency to do that. We're talking about roughly 45,000 motor carrier companies and any number of negotiated deals they may have had with shippers, of which we would be totally unaware.

Mr. RAHALL. So the practice of entering the filed rate really came about because of court decisions since the enactment of the Motor Carrier Act. Is that accurate?

Mr. PHILBIN. Well, the filed rate doctrine comes from the common law of common carriage. It's very, very ancient. There is a statutory version which is part of the Interstate Commerce Act which requires that all tariffs be filed. By law the obligation is on the carrier to file it.

Mr. RAHALL. And you are supportive of the pending legislation?

Mr. **Philbin**. Yes, sir, we are, with some technical modifications our staff feels are required to make it more effective. But, generally, yes.

Mr. **Rahall**. Let me ask you a question about the Elkins Act and what has been the extent of the ICC's enforcement of that act over the last five years?

Mr. **Philbin**. Sir, I'd have to supply that for the record.

Mr. **Rahall**. Okay. I'd appreciate it.

[The information follows:]

The Elkins Act is designed to prevent carriers from giving preferential treatment to influential shippers through the granting of rebates or other advantages. The list below shows the number of Elkins Act cases handled over the past five years. In some of these instances, Commission attorneys were able to satisfactorily conclude the cases; others were closed without action because there was no merit to the allegations; and other cases were forwarded to the appropriate United States Attorney's Office. The last column of the chart indicates cases handled by Commission attorneys in which carriers failed to adhere to the tariff requirements, but favoritism to certain shippers was not an issue. Over the last five years there were 85 of the latter types of cases, including the duplicate payment of freight charges. The table includes both motor and rail cases.

| Year | Elkins Act cases | Concluded by ICC attorneys | Forwarded to U.S. Attorney | Other types of related cases |
|---|---|---|---|---|
| 1985 | 29 | 20 | 9 | 24 |
| 1986 | 5 | 2 | 3 | 23 |
| 1987 | 1 | 0 | 1 | 17 |
| 1988 | 3 | 0 | 3 | 12 |
| 1989 | 5 | 0 | 5 | 9 |

Mr. **Rahall**. Thank you, Mr. Chairman. I have no further questions.

[The prepared statement of Mr. Rahall follows:]

Nick Rahall
for record

## OPENING STATEMENT
HONORABLE NICK J RAHALL, II (D-WV)
PUBLIC WORKS AND TRANSPORTATION COMMITTEE
SUBCOMMITTEE ON SURFACE TRANSPORTATION HEARING
CONCERNING H.R. 3243, NEGOTIATED RATES IN TRUCKING INDUSTRY

I thank the Chairman for scheduling this hearing in the wake of the Supreme Court Decision on June 21st which scrapped the Interstate Commerce Commission's method of handling the "negotiated rate" problem. The court in fact discarded the concept that in certain circumstances collection of the filed rate would be an unreasonable practice (and thus not allowed), which the ICC had relied upon in the past.

This hearing is a welcome one, giving us a chance to explore what kind of action this Committee should take in order to equitably address the effects of the Court's decision.

As most of you know, Mr. Anderson's bill was introduced last year, long before the Supreme Court decision, and so we will consider what changes to his legislation are required as a result of the decision, if any. I am confident we can do this in a "win-win" manner, without there having to be "losers" in the final resolution of the problem.

Mr. Chairman, I will have some questions for the witnesses, which may be helpful in getting all the information we need on this hearing Record for our use in the further development of H.R. 3243.

Thank you Mr. Chairman.

Mr. **Mineta**. Congressman Hastert.

Mr. **Hastert**. Thank you, Mr. Chairman. I certainly appreciate you bringing this issue before the subcommittee. I think it's important.

Mr. Philbin, let's go back and trail off of Mr. Rahall's questions a little bit, and let's go back to 1980. In your estimation of the Motor Carrier Act of 1980, basically, what did it do? How did it change your position as far as rates?

Mr. **Philbin**. It generally removed detailed regulation of rates from the books upon a reliance that open competition would regulate the rates in the marketplace.

Mr. **Hastert**. So it's a free enterprise, supply and demand.

Mr. **Philbin**. It's a free enterprise system, it allowed more people to come into the motor carrier industry, the regulation of the people coming in was minimized, and now we have grown to about 45,000 trucking companies.

Mr. **Hastert**. And then it also meant that the ability to set rates was somewhat flexible between the shippers and the carriers. Is that correct?

Mr. **Philbin**. Yes, sir, and the legislation intended that to happen.

Mr. **Hastert**. And so the problem has arisen, there's still the vestige of the past, and that's the tariff rate doctrine. Is that correct?

Mr. **Philbin**. That's exactly correct.

Mr. **Hastert**. And that was never changed with the Motor Carrier Act?

Mr. **Philbin**. No, sir, it was not. It was left on the books——

Mr. **Hastert**. So it's hanging out there, and that vestige of the past says that every time somebody makes a "new rate" or cuts a deal that they have to register that rate. Is that correct?

Mr. **Philbin**. They have to file the new rate, or the old rate will be the one that will go into effect.

Mr. **Hastert**. And, quite frankly, when an interstate carrier comes in to deal with a shipper, and the shipper says, "Wait a minute, we need a better rate than that," and they change the rate, which they have the ability to do, or "discount" rate, and so they discount the rate, and then it's the carriers that don't go back to the ICC and say, "We cut a deal with this company or that company." Is that correct?

Mr. **Philbin**. That's correct, and the legal duty is on the carrier.

Mr. **Hastert**. And so when the carrier goes out of business, then the shipper is at risk of this legal action?

Mr. **Philbin**. That's correct, sir.

Mr. **Hastert**. So it seems to me that the tariff rate doctrine is something that certainly doesn't go along with the law that we passed in 1980.

Mr. **Philbin**. In this situation, it seems to be a trap for the unwary shipper.

Mr. **Hastert**. And so the elimination of the tariff rate doctrine would be the next logical step of following through on the Motor Carrier Act of 1980.

Mr. **Philbin**. It could very well be.

Mr. **Hastert**. And you endorse that?

Mr. Philbin. I think that some amelioration is required. Of course, the basic question——

Mr. Hastert. Tell me what you mean by that.

Mr. Philbin. Well, the basic question could very well be does the filing of motor carrier tariffs at the ICC have any utility at all? That's the basic question. If the answer to that is——

Mr. Hastert. Well, let's go back to the basic question. Do they?

Mr. Philbin. I will give you a personal opinion based on the short time I have been there.

Mr. Hastert. You're the witness, and that's why you're here, and we want your personal opinion.

Mr. Philbin. Well, I wanted to make sure that the committee does not misconstrue this as an official agency position.

Mr. Hastert. We understand.

Mr. Philbin. We have over a million tariffs on file. The utilization of those tariffs by the public, people who come in to ask for tariff information, in my estimation, is very small. It is used most frequently by tariff watching services who disseminate information about tariffs. How far that's disseminated, I can't tell you.

It seems to me that with those millions of pages on file that there's so much information that the whole body of it is of rather limited utility. I personally question whether anybody is really using this information.

Mr. Hastert. So you're saying that there's no real uniformity that you can draw from this body of information?

Mr. Philbin. Certainly, the Commission is in no position to take that body of information and analyze it for any meaningful purpose.

Mr. Hastert. And every time that somebody discounts a rate or makes a deal you add onto that, and that may be——

Mr. Philbin. If they file a discounted rate.

Mr. Hastert. And they don't do it.

Mr. Philbin. They frequently do not do it, and there is no way that we can know that they should have but have not fixed it.

Mr. Hastert. Well, as a regulator, and you've spent a good deal of your life as a regulator, and you took the philosophy which many of us who have been in legislatures and now in the Congress use, that the only reason for regulation is the absence of competition.

Mr. Philbin. That is absolutely correct.

Mr Hastert. And what the bill did in 1980 is actually increase competition and allowed entry in, and so the vestige of regulation here really isn't used. As a matter of fact, it's not used, and it's not needed, and the only reason it's there is for some trial lawyers to come back and sock it to the shippers, as I see. Is that your view? Maybe I editorialize it here.

Mr. Philbin. I don't think I want to pick up on that, because I used to be a trial lawyer. [Laughter.]

Mr. Hastert. Well, that's my opinion. You're entitled to yours I'm entitled to mine. As a matter of fact, the chairman and other people in this committee know that I think maybe we ought to take one step farther and go from interstate to maybe intrastate deregulation, and you get rid of a lot of the problems that we have and certainly open our whole economy up to a little better economy and competition. So thank you for your testimony, and thank you, Mr. Chairman.

Mr. Philbin. Thank you, sir.

Mr. Mineta. Mr. Valentine.

Mr. Valentine. I have no questions.

Mr. Mineta. Mr. Clinger.

Mr. Clinger. I have no questions, Mr. Chairman.

Mr. Mineta. Mr. Cox.

Mr. Cox. At the risk of opening a can of worms, I'd like just to pursue one line of inquiry. I'd like to take several steps back, and since we have the privilege to hear your testimony today, Mr. Philbin, ask you why it is we need an ICC?

Mr. Philbin. The entire agency?

Mr. Cox. Yes.

Mr. Philbin. The agency performs a number of very valuable functions. It is a mechanism to attempt to maintain a level playing field for all of the different components of the industry—the shippers, the carriers, the brokers in between, the customers——

Mr. Cox. Let me give you a little guidance in why I'm asking the question. What is it about this industry that distinguishes it from all others and requires the Federal Government to interfere with the marketplace in determining prices?

Mr. Philbin. I don't believe the government should interfere with the marketplace where the marketplace is operating, but, of course, there are situations where the market does not operate. There are captive shippers who have no alternative modes of transportation, no alternatives to a carrier's pricing. It is in those areas that the ICC or any regulatory agency is really most valuable, to make sure that those captive shippers are not being gouged.

That, in essence, in very simplistic terms is what the ICC does in this deregulated environment. Where competition will work, there should be no regulation. Where it is not working, there must be.

Mr. Cox. Can you give me an example of an area in which competition in the marketplace doesn't work when it comes to shipping but does work for other similar services?

Mr. Philbin. There are cases of agricultural growers, coal industries who are in certain areas of the country served only by a single railroad, and the argument always is from the producers that the railroads are charging too much, the railroads claim——

Mr. Cox. So a natural monopoly, in other words.

Mr. Philbin. It's a natural monopoly. "Captive Shippers" is the term we apply to it. In those cases, someone has to keep an eye on what's going on to make sure that everything is being fairly played out. Where there are two or three railroads competing for the same products, the same cargo, regulation really isn't necessary.

Mr. Cox. Can you think of another example besides a natural monopoly where this regulation is needed?

Mr. Philbin. Offhand, I cannot.

Mr. Cox. So would you then suggest that as we approach an overall regulatory framework we try and limit the regulation itself to natural monopolies?

Mr. Philbin. I wouldn't make that statement unless I had looked at the other alternatives. There are other situations, I'm sure, where a natural monopoly may not be all encompassing, but, certainly, I think where there is competition, then regulation should be carefully scrutinized to see if it's useful.

Mr. Cox. All right. I appreciate that sort of delve into the theoretical, because there's a lot going on about us right now. I had the opportunity just a few weeks ago to talk with the minister in the Soviet Union whose job it is to determine all prices—that is, his ministry determines all prices of all goods and services in that empire, and he was over here trying to figure out how to put more market information into his decisions. I suggested to him that one of the things he might do is eliminate his ministry, since if a human being weren't trying to determine all these prices, the market could in fact set them.

Mr. Philbin. That's the basic theory.

Mr. Cox. All right. I appreciate it. Thank you.

Mr. Mineta. Those are real theoretical practices over there. [Laughter.]

Mr. Lipinski.

Mr. Lipinski. I have no questions.

Mr. Mineta. Mr. Pallone?

Mr. Valentine. Mr. Chairman?

Mr. Mineta. Oh, I'm sorry, Mr. Valentine. Did I not——

Mr. Valentine. You did call on me, sir, but I do have a question, and I think this would be the appropriate time.

Mr. Mineta. Absolutely. I'm pleased to call on our colleague from North Carolina, Mr. Valentine.

Mr. Valentine. This was brought to mind by questions asked by some of our colleagues. It's a matter that I have wondered about for some time. Isn't an example of a captive situation, if that's the way to phrase it, the situation of the transportation of coal from those mines in Virginia and West Virginia over what used to be the Norfolk and Southern Railroad? Isn't that a situation where there's only one railroad, and the mine owners, if they're going to use railroad transportation to get the coal out, they have to use that one line?

Mr. Philbin. Yes, sir, and frequently they have no alternative by way of trucking, because that is not the way you can ship coal in great bulk amounts.

Mr. Valentine. I have heard it said, and I'm sure this must be an exaggeration, that when that situation was drawn to the attention of your organization that the solution to that was to say, "Well, you know, if you don't like that, if you have to have the coal, then you just build you another railroad. We'll let you do that." Was that the response?

Mr. Philbin. I think you're referring to the stand-alone cost analysis. The suggestion was not made that the mine actually build another railroad, but that in attacking the rates being charged to the mine owners, they had to use an analysis called stand-alone analysis. In essence, they had to build on paper another railroad following the same terrain and to determine the cost of that theoretical railroad and then compare it with the charges that the actual railroad was making in order to come before the ICC and say, "The rate we're being charged is too high." It is one form of economic analysis to determine the reasonableness of a rate being charged.

Mr. **Valentine**. Thank you, Mr. Chairman.

Mr. **Mineta**. Let's see. Mr. Pallone.

Mr. **Pallone**. I have no questions, Mr. Chairman.

Mr. **Mineta**. Mr. Clement.

Mr. **Clement**. I have no questions.

Mr. **Mineta**. Mr. Borski.

Mr. **Borski**. I have no questions.

Mr. **Mineta**. All right. Mr. Rahall.

Mr. **Rahall**. Thank you, Mr. Chairman.

I'm certainly aware of the problem to which the gentleman from North Carolina is referring, representing many captive shippers of coal as I do, but I know that's under the jurisdiction of another committee.

I do have one final question that comes to mind, Mr. Philbin, and if this scenario that I paint or if the impression that I lead here is inaccurate, I would appreciate your correcting that, too, but how come in this whole debate it appears to be bad for carriers to collect undercharges but it's okay for shippers to collect overcharges from the carriers? Does that make sense?

Mr. **Philbin**. Well, as I think I've already said, I believe that the law should provide for the collection of undercharges and overcharges. I mean, we have to approach this even-handedly. The problem here is that shippers who thought they had a deal relied on it, picked a carrier based on that rate, after the fact, sometimes long after the fact, are now being billed for a higher rate that they weren't aware existed.

The duty was on the carriers to file the new rate, and they did not do so. It seems to me in this case the shippers are blameless and now have to pay the additional money to carriers who in fact were at fault or to their representatives.

Mr. **Rahall**. How much can that additional money amount to?

Mr. **Philbin**. The trade press estimates that the potential is $200 million across the country, but in testimony the other day before the Senate committee, I heard that it was possibly far higher than that.

Mr. **Rahall**. And that's in overcharges?

Mr. **Philbin**. This is in undercharges to be collected from the shippers.

Mr. **Rahall**. Undercharges, right. Okay, thank you.

Thank you, Mr. Chairman.

Mr. **Mineta**. Mr. Hancock.

Mr. **Hancock**. One question I could probably look up someplace else, but you can probably tell me just off the top of your head. What is the operating budget for the ICC?

Mr. **Philbin**. This year, it is approximately $43 million.

Mr. **Hancock**. Okay. Thank you. That's the only question I had.

Mr. **Mineta**. Thank you very, very much for being before us today and helping us to try and understand this very difficult situation.

Mr. **Philbin**. Thank you, Mr. Chairman.

[Mr. Philbin's prepared statement appears on page 199.]

Mr. **Mineta**. At this time, I would like to call on Secretary Joseph Canny, the Deputy Assistant Secretary for Policy and International Affairs, United States Department of Transportation.

Mr. Secretary, your testimony will be put into the record, and if you would go ahead and summarize and proceed in your own fashion.

## TESTIMONY OF JOSEPH CANNY, DEPUTY ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, U.S. DEPARTMENT OF TRANSPORTATION ACCOMPANIED BY MARY BENNETT REED, ACTING ASSISTANT GENERAL COUNSEL FOR LITIGATION

Mr. CANNY. Thank you, Mr. Chairman.

With me this morning is Mary Bennett Reed, who is the Department of Transportation's Acting Assistant General Counsel for Litigation and who has extensive experience in Interstate Commerce Commission issues.

We appreciate your inviting us today to discuss the Department of Transportation's views regarding the shipper undercharge issue. Ten years after the substantial reforms of the Motor Carrier Act of 1980, much has been learned and much has been gained. One thing that we have learned in the past year is that had we achieved more complete economic deregulation of the trucking industry in 1980, this hearing would not be necessary in 1990.

My written testimony restates the problem, but I believe that Chairman Philbin's testimony and your own questions and your opening statement provided enough information, so I will pass over that. I only want to add that in our view the efforts by the Interstate Commerce Commission to resolve this issue administratively in the past have been commendable, they have been carefully conceived and represented sound public policy, and it is unfortunate that court decisions have rendered those efforts insufficient.

Last year, a proposed legislative solution to the undercharge problem was agreed to by certain shipper and motor carrier groups and was introduced by Chairman Anderson, yourself, Mr. Hammerschmidt, and Mr. Shuster as H.R. 3243. It was proposed in that legislation that courts would refer undercharge cases to the ICC for its assessment as to the reasonableness of the practices at issue. This was acceptable to the shippers and the carriers because the ICC's negotiated rates policy was in effect at that time.

It is our understanding that these groups have revisited the issue and have proposed changes to that proposal in order to address the Supreme Court's recent ruling. As we understand it, the revised proposal would allow the ICC to review such cases and to find that a failure to file a negotiated rate is an unreasonable practice and that such a failure would constitute a defense to the filed rate requirements.

However, the proposal would not address the basic cause of the problem. Trucking deregulation has been extremely successful in providing benefits to shippers as well as to the overall economy. Consequently, it is not surprising that it has been one of the more popular economic reforms of recent decades. Nevertheless, we should bear in mind that what actually occurred in 1980 was not total deregulation, as Mr. Hastert's questioning brought out.

For example, while entry into the trucking industry was made somewhat easier by the Motor Carrier Act, motor common carriers must still acquire certificates from the ICC in order to operate. In addition, although there is now increased rate competition in response to market forces, collective rate making still exists. Moreover, motor common carriers must still file their rates at the ICC, even when those rates are independently set. These are just a few of the more significant economic regulatory requirements that continue to apply to interstate trucking.

Many of the reforms that this committee examined in 1980 remain on the agenda in 1990. The shipper undercharge issue relates in a very direct way to one of the key issues, the requirement that interstate motor common carriers file their tariffs at the ICC. In addition, these carriers must also, as the Supreme Court reiterated in *Maislin,* adhere to the exact letter of their tariffs, even where the shipper and the carrier have agreed to a different rate or to different conditions.

However, if the tariff filing requirement and the requirement to adhere to the tariffs as filed were to be abolished, the shipper undercharge problem would disappear. To understand the impact of the tariff filing requirement, I suggest that you imagine for a moment the situation if auto prices had to be filed at a federal agency by automobile dealers across the Nation.

If you are in the process of buying an automobile, negotiations take place between yourself and the automobile salesman. The manager approves a discount price, and a deal is struck, except that two or three years later the dealership comes around to collect the difference between the price you paid and the filed price. And to top it all off, the courts agree that you have to pay that difference. It's an absurd situation.

Is this the way to do business in any industry? We think not. We see no reason why the trucking industry should be treated any different by from most other industries with respect to the validity of business contracts. Consequently, we think the way to deal with the shipper undercharge problem is in the context of additional deregulation of the motor carrier industry, at least to the extent of eliminating tariff filing for individually set rates.

However, we recognize that shippers face an immediate problem because of the Supreme Court's ruling. We have had only a few days to review the proposal, which we understand was recently agreed to by the American Trucking Associations and the National Industrial Transportation League. This legislation appears to be a workable solution to the accumulated past undercharge cases, in light of the court's decision in Maislin. However, we cannot support this approach unless it also includes a long term solution to the underlying problem.

Moreover, on a technical level, based on our preliminary review, we believe that several modifications to the proposal are needed. First, the Supreme Court in *Maislin* did not reach the issue of whether an unreasonable practice justifies a departure from the filed rate doctrine. The ATA/NITL proposal does not specifically address this issue but states that in certain situations the Commission may find an unreasonable practice.

We suggest that proposed section 11705(b)(4)(a) specifically state that an unreasonable practice in these types of situations justifies a departure from the filed rate doctrine. My written testimony suggests specific language. Second, the proposal creates another hurdle for shippers. It requires the commission to determine that a grant of relief would not authorize an intentional violation of anti-rebating provisions of this subtitle that will result in unreasonable discrimination. It is our understanding that the reference to the anti-rebating sections is to the provisions of sections 11901, 11902, 11903 and 11914 of the Act.

We do not believe that this requirement is either necessary or desirable in today's business environment. This provision, we believe, could make it difficult for shippers to obtain relief. Would the shipper have to present specific evidence showing that it had no knowledge that the negotiated rate was not filed with the commission? Would the shipper have to establish that the motor carrier did not knowingly charge less than the filed rate? And would the shipper have to affirmatively show that no other similarly situated shipper had received transportation at a higher rate?

As you can see, this requirement could expand what would otherwise be a relatively straight forward ICC proceeding on whether there was a negotiated rate into an extended commission hearing on unreasonable discrimination and anti-rebating issues, and this would occur both at the commission and most likely thereafter in the courts.

Third, we do not believe that section 4(b) of the draft proposal the 18-month limitation period for relief, is warranted. The injustice of a carrier agreeing to and accepting payment of a rate lower than the filed tariff rate and then subsequently filing a claim for payment of an undercharge does not disappear after 18 months.

We would also note in passing the many administrative problems and the heavy burden that would be imposed upon the ICC by the provisions of this proposal, as alluded to by Chairman Philbin. We do not believe that the filed rate doctrine in the motor carrier industry is compatible with the way a modern, efficient transportation system operates or the way shippers and carriers must conduct their business in a competitive global economy.

Perhaps it was a reasonable way to operate 50 years ago, but with thousands of motor carriers competing and millions of rates and complicated tariffs on file, there is no practical way for even sophisticated shippers to protect themselves from the undercharge problem as long as the filed rate doctrine is given the judicial weight that it was accorded in Maislin. Shippers will continue to be ensnared in the regulatory web of the filed rate doctrine, and that will necessitate repeated congressional action, in our view.

In short, we believe that the compromise approach constitutes a band-aid, and not a very effective band-aid at that, when major surgery is really needed. Thus, we urge you to modernize the tariff filing requirement in the light of today's fast-paced international economy. One option that falls short of total deregulation would be to eliminate the requirement that motor common carriers file their tariffs with the commission.

Alternately, rates that result from negotiations between a shipper and a common carrier could be specifically exempted from tariff filing requirements. However, the tariff filing requirement should not be eliminated for motor common carrier rates that are collectively set pursuant to section 10706. As long as rate bureaus continue to have anti-trust immunity, collectively set rates should be filed with the ICC and be subject to the Commission's scrutiny.

However, we believe it should be made clear in the law that carriers and shippers have the right to negotiate whatever rates are mutually agreeable, without fear of penalties or retribution.

In conclusion, Mr. Chairman, we believe that the shipper undercharge problem should be addressed in the interest of sound public policy, good business practice, and fairness to shippers and carriers. We commend you for scheduling this hearing so promptly after the *Maislin* decision.

However, the general approach of both H.R. 3243 and the new proposal constitutes only an inadequate stop-gap solution. The Administration supports prompt relief for shipper interests, but it strongly prefers a permanent solution, the elimination of tariff filing requirements for independently set rates. If you determine that a legislative solution involving changes to the tariff filing requirement is warranted, we would be happy to work with you in drafting the appropriate language.

That concludes my presentation, and I would be happy to respond to any questions.

Mr. MINETA. Very well. Thank you very much, Mr. Secretary. Are you conditioning the Administration's support for H.R. 3243? On the last page here of your testimony, page 8, where you say, "The Administration would prefer a permanent solution; that is, the elimination of tariff filing requirements for independently set rates," is that a condition for the Administration's support for H.R. 3243?

Mr. CANNY. We believe that a permanent long term solution is what's really necessary. As I mentioned, we recognize the short term need to solve the problems that shippers are facing as a result of the Maislin decision, but we are not in favor of, as you said, a short term, stop-gap solution that imposes very heavy burdens on the Interstate Commerce Commission that they will have great difficulty in dealing with.

Mr. MINETA. And if the Congress were to agree to such a condition, what do you think would be the impact on the number of filings that are made at the ICC?

Mr. CANNY. When you say such a condition, you refer to H.R. 3243?

Mr. MINETA. That's correct.

Mr. CANNY. I think, as Chairman Philbin responded, there would be a large number of filings. We've read the same trade press reports, indicating that perhaps $200 million in undercharges are involved, and we've heard privately that the actual figure could be much larger than that. Consequently, we can envision literally thousands of cases being filed with the ICC and great difficulties in their dealing with those cases because of the burden of proof issue and because of the problems that would be imposed on shippers in demonstrating that there's no violation of the anti-rebating provisions. We think that it would be an administrative nightmare.

Mr. MINETA. Later today, the trucking industry will state that the goals of the filed rate doctrine are to prevent discrimination, promote competition, ensure reasonable rates and provide public notice of rates and rules. Also, those witnesses will maintain that enforcement of tariff filing requirements will assure accomplishment of these goals.

Obviously, from your testimony, the department does not agree that all rates need to be filed to accomplish these goals, and I'm wondering what's the reason for the disagreement here?

Mr. CANNY. Again, I would refer to some of the responses that Chairman Philbin provided to you. There are approximately 45,000 motor carriers who have ICC operating authority. There are some 8,000, I believe, who have operating authority throughout the 48 States. They can operate in any State of the Union, any of the contiguous 48 States.

Under those conditions, competition exists in the industry. Competition is, if anything, too intense for the purposes of some in the industry. We simply don't believe that the filing of rates and the filed rate doctrine adds anything. Indeed, if anything, it is simply a burden on competition. In short, we simply disagree with the ATA view that the doctrine serves any useful purpose in the motor carrier industry at this time.

Mr. MINETA. Thank you.

Mr. Emerson.

Mr. EMERSON. Mr. Canny, a distinction can be made between the cases where a tariff filing has occurred and undercharges are assessed on a technicality and the case where there has been no filing at all of a negotiated rate. Should Congress provide relief in both cases at this time?

Mr. CANNY. Yes, we think so. Although the distinction can be made, the practical impact on the shipper is likely to be the same, and, consequently, we think that both situations should be addressed.

Mr. EMERSON. Thank you.

Thank you, Mr. Chairman.

Mr. MINETA. Mr. Rahall.

Mr. RAHALL. Thank you, Mr. Chairman.

Mr. Canny, I'd like to ask you a question that was asked earlier of Mr. Philbin. Do you believe the ICC should continue to exist?

Mr. CANNY. No, I don't. The Administration has submitted legislation that would sunset the ICC. There are some functions which the ICC performs which we believe do need to be performed, and you and other members referred to the railroad situation, particularly captive shippers in the coal industry, and some others. We believe that the current regulatory regime for the railroad industry is basically a sound one, and needs to be retained.

However, in our view, that function can be performed more efficiently, probably within the context of the Department of Transportation, much as the remnant functions of the old Civil Aeronautics Board are performed in DOT. All of the truck regulatory functions of the ICC are, in our view, superfluous and unneeded in the current environment. Consequently, we would propose the abolition of the ICC and the transfer of its remnant functions to DOT.

Mr. RAHALL. Okay, so you favor the abolishment of the CAB and transfer of those duties to DOT, you favor the abolishment of ICC and transfer of the railroad regulation aspects to DOT, you abolish the ICC and you transfer the trucking aspects of ICC to DOT——

Mr. CANNY. On trucking, we see no need for any continuing economic regulation. We would simply abolish all the trucking regulatory requirements. There is a concern for trucking safety regulation, and that is already being performed by the Federal Highway Administration within DOT.

Mr. RAHALL. So safety in all these areas would then be under the jurisdiction of DOT. Is that accurate?

Mr. CANNY. That's correct.

Mr. RAHALL. And you feel the personnel and the enforcement and the oversight capability at DOT to handle such safety matters is adequate?

Mr. CANNY. Yes, we do, and this committee has been instrumental in strengthening the motor carrier safety program over the years, and the number of personnel in our department devoted to that function has increased very substantially. State grant in aid programs to assist the States in enforcing motor carrier safety regulations have also increased substantially over the past decade. We think that we have the motor carrier safety issue well in hand.

Mr. RAHALL. You mentioned there were still some aspects of the trucking industry to which you would agree the ICC would still have responsibilities, or DOT, whoever would have it in your scenario. What aspects are those?

Mr. CANNY. I may have misspoken. I think that no further economic regulation of the trucking industry is appropriate. The regulation of the railroad industry, which is now being performed by the ICC, we think should remain, but we think that could be done more efficiently within DOT.

Mr. RAHALL. Okay.

Thank you, Mr. Chairman.

Mr. MINETA. Congressman Hastert.

Mr. HASTERT. Thank you, Mr. Chairman.

Let's go back to some practical applications. The existence of the tariff rate situation is in question here.

Mr. CANNY. I'm glad to hear that.

Mr. HASTERT. But you say that you think that there's some room to negotiate rates. Otherwise, when you post rates, you're saying that everything is already set in a non-competitive world, that the price to A and B is set on what those costs are, and basically the ratemaking process was a cost-plus situation. Is that correct? Going back into antiquity.

Mr. CANNY. Going back in antiquity, that was correct. Since 1980, the rates that are required to be filed can reflect negotiation between the shipper and the carrier and can simply be the result of a contract.

Mr. HASTERT. So if you're hauling a load as a common carrier from Chicago to Newark, New Jersey, and you have an empty truck sitting in Newark, New Jersey, and need to get it back to the Midwest, you may want to negotiate a lower price so you don't have to deadhead back.

Mr. CANNY. Precisely. The truck brokerage industry which facilitates negotiations in that type of situation, has grown immensely since 1980, and they account for arrangements of a large percentage of the movements in these times.

Mr. HASTERT. So actually the constant flow of goods back and forth in trailers, trucks, basically is on a bidding process, who can get the product there in a set period of time at the least cost.

Mr. CANNY. I'm not sufficiently familiar with the way it works on a day-to-day basis, who makes the phone calls, and whether it's a competitive bidding process in that sense, but it certainly is a negotiated arrangement that's made, and, again, truck brokers and others are aware of what rates are being offered.

Mr. HASTERT. So the flaw in the law is that every time you have a rate negotiated between shippers and carriers, and not necessarily by themselves but sometimes by freight forwarders, every time you deviate from that set rate, you have to go file, right? According to the law.

Mr. CANNY. That's right.

Mr. HASTERT. How many trucks are on the road? How many trucks do we have on the road? Common carriers.

Mr. CANNY. A couple million, I believe.

Mr. HASTERT. A couple million, and probably every other haul that they make is a negotiated rate. Probably?

Mr. CANNY. Well, no, I may have misspoken. A couple million is probably too many for common carriers. Much of the work is being done by contract carriers.

Mr. HASTERT. But there's a lot of them out there, right? So we have the real potential if they followed this to just bury people in paperwork that you'll never get through anyway. I think the problem speaks for itself, and the basic idea that we deregulated economic entry into the market, and there still needs to be safety, and it's certainly under the leadership of our chairman and this subcommittee and the chairman of the whole committee, and I think they've done an admirable job of moving toward good safety regulation under DOT. I think we should also move forward in completing this scenario of economic deregulation, and I appreciate your testimony.

Thank you, Mr. Chairman.

Mr. CANNY. I sense, if I may, that it's a rather straightforward thing to do, that it could be accomplished with relatively simple amendments to the IC Act, and it's something that we'd be happy to work with the committee on.

Mr. HASTERT. Well, if I may, Mr. Chairman, I think it is, and I think it's necessary, and I think it's feasible, and it's like cutting some vestiges of the past off of what we need to streamline the industry. Thank you.

Mr. MINETA. Mr. Lipinski.

Mr. LIPINSKI. I have no questions.

Mr. MINETA. Mr. Clement.

Mr. CLEMENT. I have no questions, Mr. Chairman.

Mr. MINETA. Mr. Secretary, thank you very, very much.

Ms. Reed, thank you very much for being with us here today.

[Mr. Canny's prepared statement appears on page 122.]

Mr. MINETA. I would now like to call forward a panel made up of Mr. James C. Harkins, Executive Director of the Regular Common Carriers Conference, and Lana R. Batts, Senior Vice President of Government Affairs for the American Trucking Association.

Mr. Harkins, we have your testimony, and it will be made a part of the record, so if you would go ahead and summarize and proceed in your own fashion.

## TESTIMONY OF JAMES C. HARKINS, EXECUTIVE DIRECTOR, REGULAR COMMON CARRIERS CONFERENCE, ALEXANDRIA, VA, ACCOMPANIED BY KEVIN WILLIAMS, GENERAL COUNSEL; LANA R. BATTS, SENIOR VICE PRESIDENT, GOVERNMENT AFFAIRS, AMERICAN TRUCKING ASSOCIATION, ALEXANDRIA, VA

Mr. HARKINS. Thank you, Mr. Chairman.

I also have with me Kevin Williams, who is General Counsel for the Regular Common Carriers Conference, and we thank you for the opportunity to present our views.

We support the draft bill as has been worked out with the shippers and attached to the testimony submitted on behalf of the NASSTRAC and the Health and Personal Care Conference. We represent the full service motor carrier who specializes in hauling less than truckload general freight. These carriers haul virtually everything to and from anywhere in the United States, and they have the greatest demand and need for a comprehensive pricing system.

Until the last few years, when the ICC leadership was under Chairperson Gradison, the tariff system served transportation well; that is, for carriers and shippers, large and small. It is exclusively because of the policies of that former Interstate Commerce Commission that this problem exists at all. That ICC placed itself above the law and encouraged a program of secret rates and abandonment of the required tariff publication. That ICC pursued policies which the Supreme Court has now declared unlawful.

This morning and the other day, we heard testimony on the Senate side, a great deal of which dealt with special interests and was misleading as to the core problem as well as the cause, and from our perspective, unless we see clearly where the cause is, we can reach a poor remedy.

First, it should be clearly understood that the tariff system has worked well for over 50 years in disseminating both price and service information and in preventing anti-competitive discrimination. That system continued to work well for at least the first five years under the Motor Carrier Act of 1980. That system still works well for the over 40 States that maintain it within their borders, and that system did not create a hardship for shippers or carriers of any size as regards their easy determination of prices and services for truck transportation.

I re-emphasize that the problem only began when the Interstate Commerce Commission encouraged shippers and carriers to abandon that system and to deal in secret and non-published rates. The return to the system as required by law and so clearly pointed out by the Supreme Court will prevent the problem subject of today's hearing from recurring. We urge this subcommittee to officially admonish the ICC in this regard and to affirm your clear instructions in the Motor Carrier Act of 1980 that the Commission not vary from the law.

As for the draft legislation we support, we do so because it provides an equitable way to deal fairly with claims caused by the past ICC-encouraged transgressions of both shippers and carriers. We do not condone those actions and firmly agree with the Supreme Court that because of the ill-advised ICC policies in this area, the law has largely been ignored for the past few years.

We do not believe, however, that the Congress should stand aside and allow what we feel would be an unfair adjudication of claims caused by these circumstances, and that is why we support the specific remedy in section 1 of the joint shipper/carrier proposal. As regards sections 2 and 3 of that proposal, we strongly support them as well as steps in the right direction to improve on the tariff system.

We strongly urge favorable consideration of this proposal and will be pleased, along with shipper interests, to work with this subcommittee to bring about a fair solution to the problem of claims relating to violations of the tariff filing requirements. Thank you, Mr. Chairman.

Mr. MINETA. Thank you very much, Mr. Harkins.

Ms. Batts, if you would go ahead and proceed in your own fashion, please.

Ms. BATTS. Mr. Chairman, as you know, the American Trucking Association represents all types of motor carriers, many of which are regulated. As such, we have a great interest in these hearings and certainly have a great appreciation for the problem that the negotiated, but unfiled tariffs have created for both the shippers and the motor carrier industry. ATA appreciates the opportunity to present our views.

Mr. Harkins has addressed what we view as the root cause of the problem. We disagree with Chairman Philbin that the ICC was not part of the problem. We certainly feel that it was, because it created the political environment, which, allowed or encouraged the shippers and the carriers to ignore the law. When this problem was brought to the ICC's attention five years ago, its solution was to find it unreasonable for carriers and shippers to carry out the letter of the law, and file their tariffs.

By striking down that kind of ICC policy, the Supreme Court now has eliminated any doubt to all parties that they must follow the letter of the law, and file their tariffs. We think that the Supreme Court has put everyone on notice of the necessity of filed rates. As you pointed out earlier, our testimony does say that we believe the purpose of the filed rate doctrine is to prevent rate discrimination, to promote competition, to ensure that rates are reasonable, and to provide public notice of those common carrier rates. It's the last one which indicates why we believe this to be true.

The way the marketplace operates is that everyone understands what the rates are. As pointed out, when those rates are secret, one cannot have true competition and the avoidance of rate discrimination. We feel that the ICC should be enforcing those tariff filing requirements so that we can accomplish these goals and that the situation does not reoccur.

But rather than hash what has already happened, I think it's important to talk about what needs to be done. There is a need for a legislative solution, which must take place very quickly if we're to avoid the problem for a number of shippers that are trapped in a situation for which there is no exit. If it takes a long time to get that legislation, in the court cases which are already going established, they will be paying the full tariffs.

Like the Regular Common Carrier Conference, the American Trucking Association supports H.R. 3243 with revisions that were necessitated by the Maislin decision and were agreed upon by the shippers and the carriers. As Mr. Harkins pointed out, it basically has three points.

One, it allows the ICC the limited authority to review the undercharges and determine what is reasonable. Number two, reduces the statute of limitations for over-charges as well as under-charges from the current three years to 18 months. This not only reduces the shipper's exposure to negotiated rate claims, but it also reduces the administrative costs for motor carriers. Finally, it provides a mechanism by which carriers and shippers can jointly correct, with ICC approval, those inadvertent tariff filing errors and does not put motor carriers at risk to civil and criminal penalties in the Elkins Act. This last provision, interestingly enough, is allowed for the railroads, and we feel that motor carriers should have similar relief.

In closing, Mr. Chairman, the legislation which we seek will have a significant factor in resolving the unfiled, but negotiated rate problem. More importantly, it prevents its reoccurrence in the future by calling on the ICC to once again begin effective enforcement of the tariff filing requirements as required by law. Thank you very much, Mr. Chairman.

Mr. **Mineta**. Thank you very much.

Mr. Harkins, you advocate limiting the ICC's authority under section 1 of H.R. 3243 to pending claims and to claims arising from shipments that occur up to 18 months after the date of enactment of H.R. 3243. Why should a restriction of that nature be placed upon this authority?

Mr. **Harkins**. Well, I don't exactly look upon it as a restriction. I really look upon the section as a temporary remedy which is being given to shipper interests with respect to violations of the law that took place over the past few years. There is really no need for this particular provision except for the fact that the ICC encouraged that policy, and carriers and shippers for the past few years have engaged in that.

With respect to the future, if the Interstate Commerce Commission, as it should be doing as of June 21st when the Supreme Court decision came down, if it is applying that law the way it is supposed to be, there will be no more problems of this nature. Therefore, the solution that's proposed in section 1 is really only necessary for claims with respect to the violations of the tariff filing requirement already committed.

Insofar as the allowance of this to apply for a period of 18 months, that was introduced for the purpose of anticipating the fact that there will be carriers in the immediate future that will be going bankrupt and that shippers will find themselves in the same position with respect to that problem but for which claims have not yet been filed, and that 18 months is a reasonable period of time within in which carriers and shippers can assure themselves that the tariffs that have been agreed upon and the tariffs which are expected to move their traffic will be filed properly with the Interstate Commerce Commission, thereby eliminating the prospects of these claims beyond that particular period.

Further, there's also an element of even-handedness, and I was encouraged by Chairman Philbin's remark this morning where he indicated he felt the legislation should be even-handed. If that provision were allowed to be left intact without an expiration date, that would put the motor carriers in a lower position than the shippers, in that it would provide shippers with an ongoing remedy, an additional ongoing remedy, insofar as their claims that carriers were assessing charges or seeking to collect charges greater than those originally billed, where as the motor carriers would not have that same remedy with respect to undercharges.

And, of course, that's because the particular section of the bill is directed toward giving the shippers an exclusive remedy and not the carriers. But the basic reason is because there simply is no need for this provision to be allowed to exist any longer than is necessary to solve the problem created by the ICC's past policy.

Mr. MINETA. Well, I want a clarification, then. Given what Chairman Philbin has said, as well as what you've just indicated, what action can be taken by the ICC to assure that carriers will file their tariffs?

Mr. HARKINS. Well, Mr. Chairman, for a period of some 50 years, the ICC made clear to the transportation public that its policy was to enforce the law, which required tariffs to be filed. The ICC has never and never would have to assure itself that every tariff was filed specifically by every carrier in accordance with the way the law requires, because, simply, there are elements in the law that make it plain to the carrier that it is his responsibility to file those tariffs under penalty of Elkins violations, and the approach of the Commission in the past and the approach of the Commission now and in the future should be one where it explains publicly that the requirement is back in place, it was really never removed, but they are going to enforce that requirement, and therefore it's the responsibility of the carriers and the shippers to assure that the rates are properly on file.

It is more of an ounce of prevention rather than a pound of cure approach, and that had worked for over 50 years and through the first five years of the Motor Carrier Act, until the ICC changed its policy. And, it is working today in over 40 states and continues to work without problem in that regard.

Mr. MINETA. Can you give us an estimate of how many carriers in your conference provide contract carrier service, and do you believe demand for that type of service will now increase?

Mr. HARKINS. I would say that probably 80 percent of the carriers that are members of the Regular Common Carrier Conference have contract authority from the Commission, and probably 50 percent of the carriers actually are providing that type of service where it's the better type of service with respect to the shipper needs and the ability of that carrier to meet that particular need.

As to whether or not there might be an increase in that form of transportation in the future, I would say that would depend almost exclusively on whether or not the individual shippers find that a better way than simply utilizing the services of common carriage.

I would also say that today there is really not a great deal of difference in the type of carriage provided by both the common or the contract carrier and that, with respect to whether or not a contract is the better way to go, that pretty much would be determined by the needs of the shipper.

Mr. MINETA. Ms. Batts, in your opinion, is the ICC able to administer properly the rate filing requirements in the law? In other words, does it have the money, the work force, and the know-how to do it?

Ms. BATTS. I think the answer rest on will. If the ICC has the will to enforce the law, then certainly they will figure out a way to do it. I think what we saw, as Mr. Harkins was saying, over the last five years was the lack of will to enforce the tariff filing requirements. All it's going to take is a couple of instances where the ICC enforces the law. Carriers will get the word very, very quickly that tariffs must be filed.

Certainly, under the new rules, it only takes one day notice to reduce a tariff filing. We don't believe that that's an undue burden. We'd like to increase our tariffs as fast as we can reduce our tariffs. The Commission will have to look at their resources and reconsider whether they've applied those resources in the right area. But, I don't think that the problem is with the resources, per se. I think it was with the philosophy that was present in the old ICC that was the problem.

Mr. MINETA. Well, if you maintain that the ICC enforcement of the rate filing requirement is the only effective way to solve the problem completely, what kinds of steps do you think they should be taking to improve those enforcement activities?

Ms. BATTS. Again, all they would have to do is a couple of spot checks, and where there was a problem, enforce the rules. I'm a believer in examples. One hates to be the first guy that has been made an example of, but, certainly, if that was done, I believe those tariff filings would be made.

It's our feeling that there are very few unfiled, but negotiated rates. In fact, as more and more of these bankruptcy cases came up where the bankruptcy attorneys were going back to collect unfiled tariffs, we believe more shippers are demanding of the carriers that those tariffs were filed.

It would be my guess that from now on, you'll find fewer of those cases pending rather than the proliferation that people are trying to project. It is our understanding that the shippers now are demanding, and even before the Supreme Court case, to know that those tariffs were indeed filed.

Mr. MINETA. What effect would these activities have if a carrier is in bankruptcy?

Ms. BATTS. If the carrier is in bankruptcy now, under the provisions within the proposed legislation, the ICC would have the ability to look at what happened and determine if the collection of negotiated, but unfiled tariffs was an unreasonable practice. A carrier in bankruptcy right now, he would be protected, but the shipper would get the protection that he needs from going back and being forced to pay the increased tariffs.

What I thought you were asking was the carrier who is currently a going concern today, but who is not filing tariffs. Certainly, he shouldn't have any protection; he should be filing his tariffs.

Mr. MINETA. For either of you, what do you think about the Department of Transportation's proposal to eliminate filing requirements for all rates that are individually set?

Mr. Harkins.

Mr. HARKINS. Well, I guess it's quite consistent with the philosophy of the Department over the past years, because, essentially, that would be the equivalent of total economic deregulation in the trucking industry. I don't see that as a solution on point to the problem we're dealing with at all, and I don't see that it would do anything other than create a vast amount of additional problems and really trash the notion that the Congress has supported through these years that there ought not be undue discrimination with respect to the pricing of truck transportation services amongst the shipper population.

I think it's a matter of history to simply look back and see what happens in those circumstances where individual firms are left to their own devices, and I guess it can be explained that it would simply be sort of like the Golden Rule, where those that have the gold do the ruling. That's certainly one way that business can take place in this and any other country; however, I think it's a long-standing principle of this country, though, that there ought to be fairness and that there ought not be discrimination with respect to this type of a service so basic to the economy of this country.

And I certainly would not subscribe to the Department's proposal, and I think it would be really a great deal worse than any other thing that could be visited upon this problem. Certainly not necessary and ill-advised.

Ms. BATTS. Mr. Chairman, I would only add that I think the very basic premise of the filed rate doctrine says that within the marketplace the one key ingredient, whether you're in a regulated or a deregulated marketplace, is knowledge, and that knowledge is what is being charged in the marketplace. Without the filed rate doctrine, you do not have that knowledge. We believe the cost of acquiring that knowledge would be far more substantial to the shippers than under the current filed rate doctrine, where shippers can go to the ICC, or to any of the tariff watching services, and find out what the filed rates are.

It's only with knowledge that you have the kind of competition which assures that rates are low. Unfortunately, that's why rates are so low.

Mr. MINETA. Thank you.

Mr. HARKINS. Mr. Chairman, if I might sort of add to one of Lana's answers and in response to your question about what the ICC might do immediately in order to get this situation straightened out as quickly as possible, this conference has had pending before the Interstate Commerce Commission for approximately two years a request that it enforce the tariff filing requirements in accordance with an earlier decision by Justice Scalia and which has now been strongly enforced by the Supreme Court. That particular case has been ready for decision since last September, and it deals with tariff filing and secret rates and secret codes and the like.

The Commission had all of the evidence in that case available to it since last September for a decision. It can issue a decision in that particular case and make clear to the transportation public that it will enforce the law as directed by the Congress and now the Supreme Court. Thank you.

Mr. MINETA. Very well.

Mr. Hastert.

Mr. HASTERT. Thank you, Mr. Chairman.

Interesting topic. Certainly, the whole area of deregulation is even becoming more interesting all the time, but let me ask you, Mr. Harkins, you said it's not a problem in 40 States. Why?

Mr. HARKINS. They have their transportation regulations intact, and the elements of their economic regulation also have the requirements of tariff filing, and the application of the filed rate doctrine applies there as well.

Mr. HASTERT. So economic entry is not as easy in those States as other States whose systems tend not to be intact. Is that what you're saying?

Mr. HARKINS. No, that's not true. The States have modified their internal regulations over the past few years, and many of them have modified those regulations so as to provide for increased competition through greater entry.

Mr. HASTERT. So you believe the filed rate doctrine really is not a vestige of the past?

Mr. HARKINS. I think the filed rate doctrine has its origin in the past, but I think with respect to its objective of assuring that there is no unreasonable discrimination is as valid today as it is yesterday and will be as valid in the future.

Mr. HASTERT. Well, who is being discriminated against in your scenario? Who is the victim of discrimination when a common carrier, your members, go to a shipper and say, "I can give you a good deal?" Who is being discriminated against?

Mr. HARKINS. Well, I'll simply say this. Where individual carriers have found it necessary for them to establish and charge rates which are below cost and favor those which I explained before have the ability under the Golden Rule to do the ruling, and then the——

Mr. HASTERT. I lose you in your allusion there. What do you mean by that?

Mr. HARKINS. Well, essentially, the shippers with economic clout who can command lower rates——

Mr. HASTERT. Because of volume?

Mr. HARKINS. Volume——

Mr. HASTERT. And you don't have to negotiate a fee every time you pull into the dock? Is that why?

Mr. HARKINS. They don't. They wouldn't want to do that. They'd want to have their rates on a basis of a fairly stable basis, but those companies are obviously in a much better position to negotiate rates than a small shipper who doesn't command a lot of volume or have a great deal of volume, and the experience of the past 10 years under the Motor Carrier Act of 1980, and really not the Act so much as it's been the administration of the Act by the ICC, clearly has shown that there is a great deal of pricing that goes on which is discriminatory.

Mr. HASTERT. Well, why would a common carrier go to a big shipper and make a deal? Why would they be interested in doing that business? I mean, they knock on the door, don't they? I mean, they have salesmen and things like that that go and knock on the doors and make these rates?

Mr. HARKINS. Absolutely.

Mr. HASTERT. Why would they do that? Why would they take a "big shipper" and give them a better deal than somebody's dock that they pull in only twice a month?

Mr. HARKINS. Well, I guess the best way to explain it is rather than the carrier knocking on the door of the big shippers in recent years is more the case of the big shipper has been knocking on the heads of the carrier.

Mr. HASTERT. Oh, come on. Let's——

Mr. HARKINS. No, Congressman, please, excuse me. The big shippers have not only dictated what the rate levels would be, but they've also dictated what the tariffs will be and how the tariffs will be printed and what the rules and regulations under which the transportation moves will be, and they tell the carrier, "Either you publish this this way and charge this level of rates, or you lose my traffic."

Now, if you're dealing with a carrier who has to keep his trucks moving and has to keep his trucks relatively full in order to break even, and he's told by a $30 million or a $40 million or a $50 million a year shipper account that either he does it the shipper's way or he doesn't haul the freight the next morning, then his analysis is fairly simple. He's got to figure out a way to get rid of that traffic, but he can't do it overnight because it will break him.

So he's got to figure out a way over a period of perhaps two, two and a half, three years to substitute other traffic for that particular shipper's traffic, or else in the long run he'll go broke. Now, for that two, two and a half or three year period, he'll find himself hauling freight which produces operating ratios of 120 and 130, which simply means that for every dollar of revenue that he collects from that particular shipper, it's costing him $1.20 or $1.30 to haul that freight.

Now, in the shortfall, the carrier is in a down position, and he doesn't have much choice, because if he elects to tell the shipper, "Take your traffic and put it somewhere else," he's out of business overnight. So his opportunities then are limited to something over a two, two and a half, or three year pool, and that's what carriers have tried to do.

Mr. HASTERT. Well, I mean, in the meantime, theoretically, he can have a gain here, but, I mean, if you say this is the cost of doing business, and you say, "I'm not going to haul your freight," the shipper's got to go someplace else, and we'll haul that freight for that cost, right?

Mr. HARKINS. That's correct.

Mr. HASTERT. That's the free enterprise system.

Mr. HARKINS. That's correct.

Mr. HASTERT. Maybe somebody else is more efficient or they can do the job or they'll haul that freight at that cost.

Mr. HARKINS. Well, the difficulty——

Mr. **Hastert**. And you said you're not on point on this thing, because it said those rates are filed. We're talking about rates that aren't filed here.

Mr. **Harkins**. Some of the rates are filed, and some of the rates are not. Some of the larger carriers who have gone bankrupt over the past five years made those deals and didn't bother to file the rates.

Mr. **Hastert**. Why?

Mr. **Harkins**. You'd have to ask that question of the individual carriers.

Mr. **Hastert**. Well, they're your members, and you speak for those people, and I just wonder why.

Mr. **Harkins**. I do speak for them, but you'll have to ask those carriers as to why they made that particular decision. I think it was ill-advised, and I think it was unlawful, it was in violation of the law, and I guess the reason why they wound up doing it was because, frankly, they were encouraged by the former ICC to do just that, to deal in secret rates, to deal in rates that were not on file and cut deals. Now, I think that was wrong. I know it was wrong, and I think it's wrong to do it in the future.

Mr. **Hastert**. Well, it looks like the problem that exists is the existence of the filed rate doctrine, and if you do away with the tariff rate doctrine, you don't have the problem anymore.

Mr. **Harkins**. Well, excuse me, Congressman, but the filed rate doctrine is not the problem. The problem has been the Interstate Commerce Commission's policies of the past to encourage shippers and carriers to violate the law, and the application of the filed rate doctrine is just a circumstance which made the violation of the law somewhat an unwise thing to do now in retrospect.

Mr. **Hastert**. Well, I think you have two laws. You have the Motor Carrier Act as passed in 1980, and you have a vestige of antiquity here in the filed rate doctrine that has been hanging around, and they're in direct opposition to each other. Either you're going to deregulate, or you're not going to deregulate.

Mr. **Harkins**. I respectfully disagree that the filed rate doctrine and the Motor Carrier Act of 1980 are at odds with each other, quite to the contrary. The Motor Carrier Act of 1980 did introduce changes to regulation which were supposed to promote and had been promoting competition. It said nothing with respect to the elimination of the filing of rates, it said nothing with respect to the acceptance of discrimination in the future, which is sought to be prevented by the filed rate doctrine, and there is still a requirement of filing and adhering to tariffs by carriers.

Mr. **Hastert**. It's interesting. I can recall my personal experience in my district, where we have many of your members. And since I have many of your members, I have many of their drivers. I have talked to a few of your members on occasion and I say, "How is the business?" "Is deregulation bothering you?" "How are the rates?" They say, "Business is great, better than it's ever been." "No, deregulation is fine, for we are pulling full trucks all the time." "On the rates, we cut our own deals. We discount when we have to, and that is how we keep our trucks full. We are doing fine in the business area and the drivers are making good money. Business has never been better."

So, you know, I don't know. We're talking to the grass roots people, or we're talking to people who represent the organization. I just see a real discrepancy here. If the practice is to discount those rates, and actually thousands of those rates and hundreds of thousands of those rates are being discounted every day, every time you pull up to a dock, and if you need a load to go out and you negotiate a deal, and it takes you a day to verify the rate and maybe a day or maybe two days to get it through the ICC, that's really a hinderance of doing business, so I see there is a conflict, and I appreciate your testimony.

Mr. HARKINS. If I might just respond, Congressman, for a period of about 10 years, I was a traffic manager with a large shipper, and before that I worked for a railroad. I've had pretty extensive experience, and I can tell you that there has never been a major problem for a large, small, or medium sized shipper with respect to being able to determine, when it needs to, raise or lower the filed rate that moves its traffic.

There was a tremendous amount of confidence in the system before the ICC changed its policy a few years ago and encouraged secret tariff rates. That is the problem. Now, perhaps the individuals in your district are unusual in some respect as far as——

Mr. HASTERT. I don't think so. It's the midwest. It's the heartland.

Mr. HARKINS. Well, I can simply say this, and I will be pleased to submit to you the statements that I've been making over the past years that precisely show, and the ICC reports confirm, that the trucking industry, and in particular the LTL segment of the trucking industry, is in extremely poor financial condition. Things are not well. Things are not good. Carriers have been going bankrupt at an alarming rate for a number of years. For the entire year last year, our segment of the industry had zero profit. In fact, it's tantamount to a loss.

That condition continues for the first six months of this year. I don't know who has been telling this to you, but they have to be some sort of an unusual carrier, because that is just atypical of what's been going on in transportation, and that's why we petitioned the ICC to try and do something about it with respect to the pricing of services far below cost.

Mr. HASTERT. So what you believe, going back to the ICC, and we go back to the filed rate doctrine and adhere by it, and so we move away from the Motor Carrier Act of 1980 and go into a strict price structure?

Mr. HARKINS. No, Congressman, I think that the application of the filed rate doctrine would have no impact on the ability and the desire of carriers and shippers to negotiate rates in a competitive atmosphere. The competitive atmosphere by the Motor Carrier Act of 1980 is here to stay, there are a lot of good things about it, and the application of the filed rate doctrine or the message of the Commission to the carriers and shippers that the filed rates are the rates that would be charged would have no adverse impact on the ability and the desire of the shipper and carrier to continue to negotiate competitive rates and discounts.

Mr. HASTERT. Thank you, Mr. Chairman.

Mr. MINETA. Mr. Rahall.

Mr. **Rahall**. Thank you, Mr. Chairman.

Jim, let me see if I understand what you're proposing here or supporting and if it is indeed a compromise. You're saying that the shippers' claims should be recognized retroactively and up to a period of 18 months after the date of enactment of the pending legislation. Is that accurate?

Mr. **Harkins**. Yes, Congressman.

Mr. **Rahall**. And I know we're going to hear from shippers, and we're going to hear from the Creditors Alliance later in today's agenda, but is this predicted by you to be acceptable by those groups?

Mr. **Harkins**. Yes, Congressman. We have been meeting on this matter for well over a year now and have been working with committee staff trying to understand the requirements of the legislative process and to put into language a precise remedy to take care of the problem that has been caused, and we're confident and the shippers are confident and we are in total agreement with respect to the draft legislation as has been submitted by the NASSTRAC witness today, and we feel confident that that will take care of the problems which have been caused by the past ICC policy and further that, given the application of the law the way the Supreme Court and the Congress has directed, that those problems would not and could not occur in the future.

Mr. **Rahall**. What is the Creditors Alliance's position? I don't imagine they would be in support of this, would they?

Mr. **Harkins**. No, they would not support it, because it would put them in the position of having to defend their claims before the Interstate Commerce Commission, and I think it's fair to say that, given the current Commission, that those claims will be adjudicated on a fair basis, and in the light of day, I think those groups would find that their trying to collect on those claims would simply not be successful.

Mr. **Mineta**. Would my colleague yield on that point?

Mr. **Rahall**. I'd be glad to yield to the chairman.

Mr. **Mineta**. Is that 18-month provision something that's come up since the Maislin decision in terms of adding that 18 months?

Mr. **Harkins**. Yes, Congressman, the prior proposal did not have an expiration limit on it, because it was based upon the thinking and the understanding that the Interstate Commerce Commission at that time possessed the authority under the Act to be able to declare these things as unreasonable practices and to take action upon them. The former legislation sought to codify what we felt then what was the law and allow the Interstate Commerce Commission to have primary jurisdiction.

Of course, since then, the Supreme Court has said that the Commission does not have that authority, and therefore something else will have to be done. Now, obviously, the change from our point of view with respect to an expiration date is placed in there for the purpose of indicating that this is only the time frame within which this policy change is required, and if we were to leave it in there for a longer period of time, it might perhaps encourage violation in the future, and further it would also put the carriers on unequal footing with respect to processing their balance dues for undercharges versus shippers being able to process their claims for overcharges.

This particular provision only deals with a remedy for shippers and not the motor carriers. But the key point is that this particular section 1 provision is not needed except to deal with the claims that have been caused by the policy of the ICC, which has now been declared by the Supreme Court as unlawful.

Mr. **Mineta**. Well, if my colleague would continue to yield, would that same philosophy apply to section 3, then?

Mr. **Harkins**. Section 3 is the section which deals with the ability of the carriers and the shippers to petition the Interstate Commerce Commission and request allowance to waiver undercharges where the carrier has made an inadvertent error in tariff publication. We think that this is a needed amount of flexibility with respect to the application of tariff rates.

Today, without that particular flexibility, if a carrier makes an error in the tariff, he must tell the shipper that he has made the error and submit to the shipper a balance due billing. Now, this can be a bit of a problem with respect to a carrier who has agreed to a particular rate and then made the error and then subsequently tells a shipper, "I have to submit a balance due bill to you for some $10,000 or $20,000."

Mr. **Mineta**. But the problem——

Mr. **Harkins**. Today, his alternatives to correct that error are to try and reduce the rate for the future in some way to make things balance out. Now, what we have proposed here is for the shipper and the carrier to be able to submit to the Interstate Commerce Commission evidence of the fact that they made an error and for the Commission to review that and then authorize the waiver of undercharges so as not to have that error create a real problem.

Mr. **Mineta**. But it says under section 3 here that "arising from the inadvertent failure to properly and timely file." So if you're to properly and timely file and maintain agreed upon rates, should that philosophy maybe not extend also to section 3?

Mr. **Harkins**. Well, section 3 does refer to the failure to properly file and maintain. I mean, that's the definition of a simple tariff error. For example, if the carrier agreed to a level of rates for a particular shipper and published the wrong zip code, therefore that level of rates would not apply to the shipper because of the inadvertent tariff error, and the carrier would then under the current law be required to assess the other rates which applied formerly and which had not been agreed upon.

Now, this provision would allow the carrier to explain the circumstance to the Interstate Commerce Commission, make clear that it was a tariff error, and allow the Commission to review it and satisfy itself that it was an error and then authorize the waiver of the undercharges which would have been caused by that tariff error. It's just a provision that the railroads now have and have had for a number of years, and it adds flexibility, I think needed flexibility, to the tariff system today, which doesn't provide for that type of a relief.

Mr. **Mineta**. I thank my colleague for yielding.

Mr. **Rahall**. So your basic position, or the basic position of the Regular Common Carriers, then, of course, is to support the filed rate doctrine in the future?

Mr. **Harkins**. That is correct, Congressman.

Mr. **Rahall**. And I understand the fairness question, and you've, I think, very well responded to the discriminatory aspects that you're trying to prevent and the need to obtain a fair rate of return for carriers, and I can understand that position, but in preserving the filed rate doctrine, is that not a tremendous paperwork burden that you are still subjecting yourself to and asking that you continue to shoulder that burden? Just maybe briefly, what is involved in filing that rate in regards to the paperwork and what you have to go through with the ICC, the legal work required? Isn't it a tremendous burden?

Mr. **Harkins**. Not really. Some people will suggest that it is, but there are two aspects of that circumstance, Congressman. In the first place, the motor carriers today have to maintain for themselves within their own offices their full scale of rates so that publication of those rates in a publicly available file at the ICC is really a simple administrative matter, and it is not of great cost.

Secondly, there is an ongoing proceeding at the Interstate Commerce Commission with respect to—and Chairman Philbin mentioned it earlier this morning—with respect to the ability of filing rates in an electronic way so as to take advantage of computer applications. It's quite simple, for example, for one motor carrier that has nation-wide service for multiple shippers to be able to put on a simple five and a half inch floppy disk for a personal computer with an algorithm formula its entire rate structure for a particular shipper and for that shipper to avail itself of that by use of its own personal computer.

It's a very complex system, it's a very demanding system with respect to the types of service and the array of services that these carriers provide, but we've had over 50 years of experience in developing the rate structures, and they are quite accurate, and they lend themselves to either printed publication or electronic publication, and it's really not that big a problem.

Mr. **Rahall**. So it's work that you have to do anyway, and you've been doing it and will have to continue to do it regardless, and it's not that additional burden upon your carriers.

Mr. **Harkins**. I agree, and I think we should continue to do it, because it has as a basic plus one element of the market theory that requires a market theory to be able to work. That is that those that buy the service have a reasonable way of finding out who's providing the service and what cost and what competitive cost. Without that, you don't have a really effective market theory working.

The tariffs do provide that. They disseminate information quite well, and they allow for interactivity of competition amongst carriers by virtue of the services and prices they charge.

Mr. **Rahall**. This, of course, is a very complex arena. You heard Mr. Canny earlier present in a very simplified fashion his arguments for the deregulation, or complete deregulation, if you will. He compared it to an auto dealership, and he says, and I'm quoting from his testimony,

> Imagine that auto prices had to be filed at a Federal agency for dealerships by dealerships across the Nation. Negotiations take place between you and the salesman, the manager approves a discount price, and a deal is struck, except that two or three years later, the dealership comes to collect the difference between the price that was paid by the customer and the filed price, if the auto dealership had to file its prices, and then to top it all, the courts agree that you have to pay.

That's, as I say, a rather simple scenario, but that's probably one that John Q. Public would understand a little better than what the reality is. How would you respond to John Q. Public when this scenario is presented?

Mr. HARKINS. You know, the object of the filed rate doctrine and the filing of rates is, of course, essentially to prevent discrimination, and the provision of transportation service is so basic to the American economy and American industry that it is really unacceptable to have situations whereby there can be widespread discrimination, because that, fundamentally, is anti-competitive.

If a less efficient firm that is perhaps larger and can demand better prices, so to speak, than a more efficient although smaller firm is able to reach its market at a better price than the more efficient firm, then, obviously, we're going to have a situation where that produces an anti-competitive circumstance, and it's really not in the best interest of the economy.

On the other hand, I won't try to document cases with respect to the operation of our economy in those areas where there isn't the application of this particular doctrine. I do know, though, that I've had personal experience where I've been discriminated against in the purchase of many things, including automobiles. I don't like it, I think there are a lot of things that can be done with respect to that, but I'm not about to take on that particular problem right now.

What I'm simply saying is that, given the circumstances, given the importance of transportation to this economy, that you can go either way, and truck transportation will be around. But in my judgment, and in the judgment of history, the better way has been to have some sort of process involved where large and small can get fair treatment without undue discrimination. That's better for the economy, I think it's better overall for the country, and it's done at a very, very reasonable price.

Mr. RAHALL. Everybody knows that used car dealers and politicians are usually rated at the very bottom of the popularity polls, but it appears in this simple scenario that is painted with dealerships that if that were allowed to happen there would be a great deal of secret deals, and it doesn't appear that the dealership is going to come out improving his ranking as far as respect and trust from the American public.

If these secret deals were allowed to take the place all the time, the next person is going to come in and say, "Hey, I heard what you gave John Jones. Why can't you give me a better deal?" And it just appears to me that this would further not only hurt auto dealers in that respect but also cause a black eye to be cast upon carriers who in the future would be entering into these secret deals more so than what's going on today, perhaps, and I don't see the American people's trust in the whole system going up any further in the popularity polls.

Mr. Harkins. I agree, and I might add that as far as individuals rating Congressmen in that respect, I think that might only happen because they don't know them. [Laughter.]

Mr. Mineta. To carry on this analogy with the automobile dealer, if Mr. Rahall buys one car, that's one rate, but then if I come in and buy 10 cars from you, there's another rate maybe.

Mr. Harkins. I agree completely, Congressman, and that's one fundamental element of discounting. There is nothing about the regulatory process nor the pricing of services today that prevents the recognition of appropriate rate levels as regards what we might call joint sharing of economies by carrier and shipper.

Obviously, if a shipper can produce the type of freight and revenue for a particular carrier that enables it to be a more consistently ongoing firm, the rate level should be consistent with those elements, whereas an individual who is an occasional shipper and doesn't really provide those types of economies for a particular carrier, he obviously should pay for the service that he's getting, and it should be, I think, at a rate commensurate with that, which would be probably less of a discount rate than the rate to the larger shipper.

Mr. Mineta. I thank my colleague.

Mr. Hastert. Would the gentleman yield?

Mr. Rahall. Yes, I'd be glad to yield.

Mr. Hastert. Thank you.

You know, you described explicitly what I described before, that some people are huge volume dealers or business people and shippers, and they get a better rate than a guy who only has a truck backed into his dock two or three times a month. So you're saying there should be discounts for that type of business.

Mr. Harkins. Obviously, obviously. What I'm saying also, though, is that the discounts should not be such that they go below the carrier's cost line and therefore that the carrier has to discriminate against his other shippers and charge them higher rates than they ordinarily would in order to make up for that below cost discount.

Mr. Hastert. A cross subsidy situation. Do you think that would be regulated?

Mr. Harkins. Pardon?

Mr. Hastert. Do you think that whole cross subsidy situation should be regulated? I mean, should the shipper make that decision, or should somebody in the ICC make that decision when they file the rate?

Mr. Harkins. Well, the law on the books now provides for that being against the law, and I think it's a good law, and I think that there are circumstances where carriers would find it appropriate to price some of their services below cost, and I think it's appropriate for the Commission to ensure that when they do that, and it's a very simple process, but for them to ensure that where they do that they're not doing it in such a way as to cause them to discriminate against other shippers. It's simply a matter of fairness.

Mr. Hastert. What if XYZ, a member of your coalition, a carrier, comes in and says, "You know, I know I can pull 10 trucks out of this guy's dock every day, and it's going to cover my fixed cost. I'm going to set his rate here or give him a discount at this level.

And three other shippers over here that I only pull in their dock three times a month, they're going to have a different rate."

That carrier makes that decision depending on his own economic situation, how many trucks he's got rolling, how many people he's got permanently hired, what his cost of business is, what his licensed costs are, what his insurance costs are, all these things, and then he makes a decision. Does he need to go then to the ICC and get that ratified every time he makes a decision?

Mr. HARKINS. No, he simply files the rate and tariff, and I think that's quite appropriate a decision for the carrier to make. The area that we're talking about with respect to greater Commission oversight is in the area where, as I explained earlier, the carriers have very little alternative in pricing some of their services with particularly large shippers and are dependent upon those large shippers to sort of keep the freight in the pipeline, to keep their trucks moving and producing some revenue.

Mr. HASTERT. But the freight's going to be in the pipeline regardless, right? If it doesn't go to XYZ company, it may go to ABC company. I mean, the shipper's not going to leave that stuff sitting on his docks.

Mr. HARKINS. That's correct.

Mr. HASTERT. So somebody in the system is going to carry it.

Mr. HARKINS. That's also correct. We're simply saying that whoever it is that carries it ought not be carrying it at rates that are below its costs to the extent they put an unfair burden in a discriminatory way on the other shippers in the system.

Mr. HASTERT. Thank you. Thank you for yielding.

Mr. RAHALL. Oh, I forgot I was yielding.

One final question for Ms. Batts, if I might. Is there unanimity within the ATA in this latest compromise proposal?

Ms. BATTS. Yes, the ATA supports the filed rate doctrine and supports the proposal that's been put forward to deal with the immediate problem on negotiated, but unfiled tariffs. Thank you.

Mr. RAHALL. Thank you.

Thank you, Mr. Chairman.

Mr. MINETA. Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman, and I'll be very brief because there are a lot of other witnesses we need to get to.

Ms. Batts, I notice in your testimony you say that the filed rate doctrine, the main purposes are to, among other things, promote competition and to ensure that rates are reasonable. I'm not really clear on that. How would competition be lessened without the filed rate doctrine?

Ms. BATTS. Well, competition allows people to know what the other individual has been charged. If I could go back to the automobile dealer analogy, I think it's perfect. I'm looking for a car right now and spending, unfortunately, too many weekends looking. I decided a long time ago I was not going to take my husband on this deal. This was my car. And I walk in and the dealer starts calling me "sweetie" and "honey," and I know I'm getting ripped off. I'd like to know what he charged the guy that walked in before with the Z and knows all about cars. Nine times out of 10, I'm going to pay more.

I wish there was someplace I could go and see what the last 10 cars sold for, because I know I'm going to pay more, guaranteed. The free market system assumes that all negotiating skills are even. But everybody's negotiating skills are not even. Clearly, mine in buying a car are not. By knowing what everyone else is charged, then you have level playing field. The whole economic theory of competition assumes that there is a level playing field in the area of knowledge.

Mr. DUNCAN. In most other businesses and industries, though, you don't have something similar to this filed rate doctrine, and people don't seem to have trouble finding out what rates are for various other business and industries. Is that not correct?

Ms. BATTS. That's not true. They find out in other ways. Those other ways tend to be much more expensive. Where you've got a small number of groups, they signal their prices through the newspapers. What this produces is a very level playing field for 45,000 plus competitors that are dealing with hundreds of thousands of shipments. It's the volume that we're talking about that requires some kind of a central area to find the knowledge.

People will find out, but it's going to be very costly, and it will not allow them to find out like they do now. We have to file those tariffs, and instantaneously, under the new EDI system, people are going to know what it is, so that given the dynamics of the transportation market, that knowledge is almost going to be on a real time basis.

Mr. DUNCAN. Have you made some studies or what proof do you have or what makes you think that rates would automatically become unreasonable if there was not a filed rate doctrine? You have a lot of competition in the trucking industry at this time, and I just wonder what—you say that one of the main purposes is to ensure that rates are reasonable. Why would rates become unreasonable if it were not for the filed rate doctrine?

Ms. BATTS. Again, it goes back to what Mr. Harkins was talking about in terms of the size of the number of major shippers. The unreasonableness is probably not going to be that the rate's too high; the unreasonableness is going to be that the rate's too low and that other shippers have to make up the difference.

I do have a problem when somebody starts talking about something that's 50 years old, and that's antiquity, but—

Mr. DUNCAN. You're saying the unreasonableness would come about because the rates would be too low?

Ms. BATTS. That's correct.

Mr. DUNCAN. All right.

Mr. Harkins, let me ask you this. You have a paragraph in your testimony which says, in short, adherence to the law will preclude future instance of claims against shippers based on filed rates, and here's the interesting language, "because shippers will ensure that carriers will file those rates before they use their transportation services." Why should that obligation be on the shippers to ensure that the carriers have done the right thing?

Mr. HARKINS. It's just a sound business practice for an individual who works for a particular company to make certain for that company that any services he engages in are going to be done so at the price he expects to pay. It's the carrier's obligation to file that tariff, and I believe, as it was said in the Supreme Court decision, if a shipper is able to get a carrier to name a particular rate that he likes, it's simply not a problem for that same shipper to tell that carrier that he better file his tariff and do it legally. It's not a problem.

Mr. **Duncan**. Well, let's turn that around for just a minute, though. Do you think it would be fair to require trucking companies to make sure that shippers have done everything legally that they were supposed to do in their particular business?

Mr. **Harkins**. Not everything with respect to their particular business but certainly with respect to the transportation services they provide, and that responsibility is on the carriers in a lot of areas, particularly with respect to the way shippers package their freight. There are a lot of requirements out there for packaging freight, particularly in the area of hazardous materials, and it's incumbent upon the carrier that when he accepts a particular shipment from a shipper that he assures himself reasonably that those particular requirements are met by the shipper.

There is a lot of dual responsibilities, particularly when you're dealing with a type of service such as this where it's important to the economy and important for the country and many aspects of it are important for the public at large, again, particularly with respect to hazardous materials.

Mr. **Duncan**. All right, thank you.

Thank you, Mr. Chairman.

Mr. **Mineta**. Well, you can see the amount of interest there is since you've been here before us close to an hour, so this has generated a lot of interest, and we appreciate your testimony here and help in educating us on the ins and outs of this legislation. Thank you very much.

Ms. **Batts**. Thank you, Mr. Mineta, for calling these hearings so promptly after the Supreme Court decision. We do appreciate that.

[Mr. Harkins' prepared statement appears on page 180.]

[Mr. Batts' prepared statement appears on page 109.]

Mr. **Mineta**. At this time, the subcommittee will take a break. We will reconvene at approximately 1:30.

[Whereupon, at 12:35 p.m., the subcommittee recessed, to reconvene at 1:30 p.m. the same day.]

### AFTERNOON SESSION

Mr. **Mineta**. The Subcommittee on Surface Transportation will please come to order. I'd like to call forward at this time Mr. Steven D. Fernlund, Chairman of the Legislative Committee of the Transport Brokers Conference of America.

Mr. Fernlund, it's good to have you here with us. I was a broker—insurance broker.

Mr. **Fernlund**. I remember that.

Mr. **Mineta**. So anyone who's a broker I always welcome.

Mr. **Fernlund**. Thank you.

Mr. **Mineta**. Your statement will be made a part of the record, so if you'd like to go ahead and summarize and proceed in your own fashion, that would be fine.

## TESTIMONY OF STEVEN D. FERNLUND, CHAIRMAN, LEGISLATIVE COMMITTEE, TRANSPORTATION BROKERS CONFERENCE OF AMERICA, ST. PAUL, MN

Mr. FERNLUND. Thank you, Mr. Chairman. Accompanying me today is Mr. Robert Gallagher, who is Counsel to the Transportation Brokers Conference of America.

My name, again, is Steve Fernlund. I am President of a company named Twin Modal, a transportation broker, ICC-licensed. We serve customers with offices in seven States. Our company is employee-owned, and we are facing claims for freight undercharges that approach $250,000.

Today, I am representing the Transportation Brokers Conference of America. It consists of 1,400 members, all of whom are ICC-licensed brokers, the majority of whom are small business people, and many of them are also facing these negotiated rates type of claims.

We're here today because there are regulations on the books that are fundamentally incompatible with the marketplace that has existed in the trucking industry since 1980. These regulations and the filed rate doctrine allow unproductive and undeserving entities, namely, auditors representing bankrupt carriers and their attorneys to profit from the negligence of the motor carrier industry.

The real problem is not one of negotiated rates, but the problem has been that motor carriers have failed to file the rates they negotiated in good faith with the ICC, which they are required to do. This failure to file is not a recent aberration based on a liberal Interstate Commerce Commission. The shipments that moved for Primary Steel by Maislin took place in 1981 and 1982. That was shortly after the Motor Carrier Act enhanced competitiveness in the trucking industry.

Today, brokers and shippers are being asked to pay substantial claims because of carriers' failure to properly file rates. This may be legal, but it's not fair. The filed rate doctrine, by the way, is not just for bankrupt carriers. If the legislation we're considering today is not enacted, all motor common carriers must audit three years worth of freight bills that they have issued to customers. Where these bills did not specifically follow filed tariffs, the carriers must present balance due claims to their customers.

If this comes to pass, it will make the estimate of $200 million that we've heard today seem like the tip of the iceberg. It is my belief that if legislation is not enacted, we could be here one year from now facing claims exceeding $1 billion. It's a nice windfall for the existing carriers, but once again it doesn't seem fair to brokers and shippers.

Brokers and shippers who have dealt with carriers who hold both common and contract authorities from the ICC are mistaken today if they think a written contract will protect them from these types of claims. Even though the transactions were intended to be contract carriage intended by both parties and thus exempt from tariff filing, the written contracts are challenged based on technicalities. The attempts are made to convert the transactions from contract to common carriage, and higher tariff rates are assessed. As a matter of fact, this is the basis for all $236,000 in claims made against my company.

The TBCA believes that the filed rate doctrine is simply bad policy. It adds to the carrier's cost of doing business and has not been demonstrated to serve any purpose in the public interest. It is certainly incompatible with the deregulatory intent of the Motor Carrier Act of 1980. Furthermore, filed tariffs today seem to provide no meaningful information to shippers or carriers.

The Regular Common Carrier Conference of the American Trucking Association filed a petition with the Interstate Commerce Commission. Mr. Harkins referred to that petition earlier in which they are asking for a more rational tariff filing system eliminating secret coded rates. In their petition, they pointed out that the Commission's files today, because of the regulations they're being filed, that the tariff files today are replete with tariffs which reveal no meaningful rate information at all. Neither the rates charged nor the traffic to which rates apply is discernible from these filings, referring to specific coded filings that do not disclose shipper or commodities in some cases.

The TBCA happens to agree with this statement, and we submit it as evidence that the filed rate doctrine as it's being implemented today is not working and should be repealed. With its decision in *Maislin*, the Supreme Court has pointed out the incompatibility of the filed rate doctrine with today's marketplace. The Interstate Commerce Commission has recognized this fact for years, as is evident in the negotiated rates doctrine, which the Supreme Court struck down.

The time is upon us now when Congress must make a decision to reconcile this incompatibility. We strongly urge the Congress to reverse the court's decision in *Maislin* by writing new laws more compatible with the realities of the marketplace, to acknowledge the legitimacy and the lawfulness of rates that are negotiated in good faith between two business entities, and to relieve brokers from the strict obligation to pay filed tariff rates. Moreover, we recommend that Congress grant the ICC the authority to afford such relief.

In addition, we hope that these hearings have exposed the filed rate doctrine as the ugly menace that it really is and that Congress will take steps in the near future to repeal it. We do support the legislation that has been presented by Coalition of Shippers and Motor Carriers that we feel would bring immediate relief to our members. Thank you, Mr. Chairman.

Mr. **Mineta**. Thank you, Mr. Fernlund. Given the procedures that are being followed right now, how does a broker check to determine if a motor carrier rate has been filed with the Commission?

Mr. **Fernlund**. Our Association has encouraged our members for many years to do business with contract carriers under written contract agreements. In situations where common carriers are used by brokers, the ones that I have talked to have told me that they ask for and sometimes receive a receipted copy of the tariff page that's been filed with the ICC. To my knowledge, no one actually goes to the Commission to determine that that rate has been filed.

Mr. MINETA. Given the fact that you do favor H.R. 3243, do you support limiting the ICC's authority to existing claims and claims arising up to 18 months after date of enactment of H.R. 3243?

Mr. FERNLUND. No, we share the chairman of the Commission's view that there should be no time limit on this bill.

Mr. MINETA. Very well. Thank you.

Mr. Duncan.

Mr. DUNCAN. Mr. Fernlund, just a couple of questions. First, if this decision was allowed to stand and the Congress did not pass this bill or take any action at all, what effect would it have on companies such as yours?

Mr. FERNLUND. Quite frankly, I believe that if the bill is allowed to stand, my company could be facing claims in the millions of dollars and would literally force us out of business.

Mr. DUNCAN. And so you think that same thing would happen to companies similar to yours all across the United States?

Mr. FERNLUND. Yes, I do.

Mr. DUNCAN. And those are, I assume, primarily small businesses?

Mr. FERNLUND. That's correct, sir.

Mr. DUNCAN. You mentioned in your prepared testimony that the ICC encouraged in some ways less than truckload carriers to offer discount rates. How did the ICC do that?

Mr. FERNLUND. I think the ICC, in implementing the Motor Carrier Act of 1980, encouraged common carriers to establish competitive pricing and price options to meet the needs of the marketplace.

Mr. DUNCAN. I'm not really familiar with the process of filing a rate, and I didn't hear some of the testimony this morning. How difficult or how time consuming is it for a trucking company to file a rate? Does it take a long time, or what's the situation there?

Mr. FERNLUND. I'm really afraid that I can't answer that question. I've never had the opportunity to do that myself.

Mr. DUNCAN. But have you heard some trucking companies talk about it? Is it a complicated procedure? Or you just don't know?

Mr. FERNLUND. I honestly don't know. I have never heard a trucking company discuss the issue of how long it takes to file a tariff.

Mr. DUNCAN. Well, I think the most telling sentence in your testimony a while ago, you said, "This may be legal, but it's not fair."

Mr. FERNLUND. That's correct.

Mr. DUNCAN. This whole situation. Thank you very much.

Mr. FERNLUND. Thank you.

Mr. MINETA. Thank you very much, Mr. Fernlund and Mr. Gallagher, for being with us today.

Mr. FERNLUND. Thank you, Mr. Chairman.

[Mr. Fernlund's prepared statement appears on page 163.]

Mr. MINETA. I would now like to call forward a panel made up of Mr. Earl W. Beck, Director of Transportation Worldwide, Eaton Corporation, and Chair of the Legislative Committee of the National Industrial Transportation League, and Mr. Thomas M. Moore, President, National Small Shipment Traffic Conference, and for the Health and Personal Care Distribution Conference.

Mr. Beck, your statement will be made a part of the record, and so if you would go ahead and introduce your colleagues and proceed in your own fashion, sir.

### TESTIMONY OF EARL W. BECK, DIRECTOR OF TRANSPORTATION WORLDWIDE, EATON CORPORATION, CLEVELAND, OH, ON BEHALF OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, ACCOMPANIED BY RICHARD D. FORTIN, LEAGUE COUNSEL

Mr. Beck. Thank you, Chairman Mineta and members of the subcommittee.

I'm Earl W. Beck, Director of Transportation Worldwide for Eaton Corporation, Cleveland, Ohio. I appear today on behalf of the National Industrial Transportation League. Currently, I'm the chairman of the League's Legislative Committee, and League Counsel, Richard D. Fortin, is accompanying me.

The League is here to respectfully request prompt enactment of H.R. 3243 with certain technical amendments in order to solve a problem which poses a major threat to shippers and motor carriers competing in today's highly market-oriented environment. This problem needlessly will add hundreds of millions of dollars to the country's freight bill without producing any benefits for our national transportation system.

We also would like to take this opportunity, Mr. Mineta, to thank you for your support and leadership in co-sponsoring this important piece of transportation legislation. This problem, which threatens the continuation of competitive truck industry, was created by the Supreme Court's recent decision in *Maislin* v. *Primary Steel*, which rejected the Interstate Commerce Commission's policy addressing the negotiated rates problem. The practical results of this ruling is that thousands of shippers, most of them small or uninformed businesses, again are prey to a handful of entrepreneurs, who are engaged in an exploitation of certain provisions of the Interstate Commerce Act primarily for their own benefit.

Under the Interstate Commerce Act, it is the carrier's duty to file with the Commission every rate it uses to transport goods. If the carrier fails to do so, or if it fails to fully inform a shipper about any technical obligations needed to qualify for the rate, the shipper can face after-the-fact claims by third parties who were not involved in the negotiations of those transportation services. This liability can exist even in those instances where a carrier shows a shipper a sample tariff page, or where it makes assurance, quite often in writing, that the appropriate filings have been made at the ICC.

While it is not fair that a carrier's misrepresentations or inactions create a liability for the shipper, it is a requirement recently reaffirmed by the Supreme Court. Given the proliferation of rate and service options created by the 1980 Act, the Commission recognizes that shippers need protection against unreasonable claims by third party collection agencies.

Using its authority to protect shippers from unreasonable practices, the agency issued its negotiated rates policy. This policy was especially beneficial to the thousands of small shippers who lack the transportation expertise to defend themselves. They relied upon carriers' credibility to accurate information on whether the rate being quoted was for file with the Interstate Commerce Commission.

The ICC policy worked well. It required the shipper to show that it acted in good faith when paying the rate quoted and billed by the carrier. The ICC policy provided the procedures needed to recognize legitimate claims, and to reject those that solely are the result of calculated manipulation of the tariff rules.

The collection agencies allege that the carriers' creditors will suffer undue economic hardship from the continuation of the negotiated rates policy. As a practical matter, there is no hardship when a bad undercharge claim is denied, since the carrier never had a lawful right to those funds.

With the ICC adding five million pages a year to its tariff library, there is no longer such a thing as one rate for one shipment. The class rates, which the collection agency attempted to collect, are the highest rates published. They are list or sticker price used as a base point for developing market rates to move freight.

The Commission should be allowed to prevent third parties from stripping some shippers of their market discounts, thereby protecting against a discriminatory result. Otherwise, some shippers would be forced, after the fact, to pay very high rates, rates that would not reflect the market conditions.

Our objective today is to stress the critical need for your help in clarifying that Congress did intend for the 1980 Motor Carrier Act to promote competition and market pricing, and that it did intend for the ICC to protect shippers from unreasonable practices. This help requires the enactment of H.R. 3243 during the remaining days of this Congressional session. However, because of the Supreme Court's ruling, certain technical changes are needed. We have provided your staff with suggested changes.

H.R. 3243 does three things. First, it clarifies the ICC right to examine the reasonableness of undercharge claims. Second, it shortens the statute of limitations for the filing of undercharge and overcharge claims. Third, it allows the Commission to adopt procedures for informal resolution of inadvertent tariff errors.

I want to thank the subcommittee for this opportunity to provide the views of the shipper community. The League looks forward to working with you and your staff so that an effective and workable solution to the negotiated rates crisis can be found during this Congressional session. I would be happy to answer any questions you may have.

Mr. MINETA. Mr. Moore, your statement will be made a part of the record, and so if you would go ahead and introduce your colleague and proceed in your own fashion.

### TESTIMONY OF THOMAS M. MOORE, PRESIDENT, NATIONAL SMALL SHIPMENT TRAFFIC CONFERENCE, WASHINGTON, DC, ON BEHALF OF THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE ACCOMPANIED BY DANIEL J. SWEENEY, GENERAL COUNSEL

Mr. MOORE. Thank you, Mr. Chairman.

My name is Thomas M. Moore, and I am submitting this testimony on behalf of two associations of shippers—the National Small Shippers Traffic Conference (NASSTRAC) and the Health and Personal Care Distribution Conference. I am President of NASSTRAC and authorized to testify for the Health and Personal Care Distribution Conference. Joining me today is our General Counsel, Daniel J. Sweeney.

There are over 300 shipper members of these two conferences. Their members ship the majority of their freight in small shipment or LTL quantities by regulated motor common carriers. Our memberships include many of the major customers in the trucking industry as well as smaller companies. This hearing is to address the most important menace facing our members today—collection agents for bankrupt motor carriers who resurrect freight bills up to five years old and go through the tariffs with a fine-toothed comb to try to find some excuse to raise the rates and create undercharges.

These undercharge claims are presented on an unlimited variety of theories, including rates that were negotiated for the particular shipper's traffic but not filed by the carrier for whatever reason, rates that were not filed promptly so as to miss the first several months of shipments, rates that were published in a tariff and charged in the original bills that allegedly are defeated by some technical rule found in some other tariff, et cetera.

The variety of tariff reasons for undercharge claims is limited only by the broad imagination of the individual collection agent auditor. While the claims all have in common that the collection agent is attempting to renege or go back on the rates which were understood to apply prior to the shipment and were actually charged in the freight bill, it is important to note that in most instances, the agreed rates were actually published in the tariff.

This is not a matter of trying to bail out a few shippers making secret rates by not publishing the rates in tariffs. At a time when the industrial sector of the Nation is swamped with undercharge claims, the Supreme Court has come forward with its Maislin decision, overruling decisions from the Circuit Courts with only one exception, supporting the Commission's attempt to protect shippers from being exploited under the guise of the filed rate doctrine. The Maislin decision has created renewed vulnerability for the shipping public to these questionable claims.

These conferences, together with other shipper groups in the leading trucking industry groups, were instrumental in the development of H.R. 3243. Since the Maislin opinion, we have again worked in coordination with those groups to develop a revised bill which is believed to have common support. This bill makes it clear that the Commission may not only find a failure to file the rates to be on an unreasonable practice but that the use of tariff rules, classifications or other practices to defeat the negotiated rates which were filed may also be found an unreasonable practice.

As did H.R. 3243, this proposed revision of that bill would provide that it applies to pending cases as well as future claims. Otherwise, the collection agents would be able to take the $200 million which they are claiming from the shippers. We understand that collection agents and attorneys, who keep the lion's share of whatever money is extracted from the shippers, are appearing before Congress to plead the case for whatever amount trickles through to the creditors and employees. The bill only protects the shipper, by definition, where it would be unreasonable to force an additional payment.

Surely, a creditor has no right to recoup its funds by unjustly taking them away from a third party. These undercharges were creatively created by the auditors after the carrier went into bankruptcy. Thus, at the time when the creditor advanced its goods or services, there was nothing on the carrier's books by way of an accounts receivable upon which the creditor relied. Furthermore, none of the shipments represented by these undercharge bills would have moved by the carrier if these increased rates were charged. The same rates as originally charged were generally available from other carriers, and the freight would have been shipped by those carriers, not at the higher rates now being charged.

Mr. Chairman, a revised copy of H.R. 3243 is attached to my prepared testimony. I thank you very much.

Mr. MINETA. All right. Before we get into the questions, I think since we have a call of the House, we'll go ahead and recess at this point and reconvene in 15 minutes.

[Recess.]

Mr. MINETA. The subcommittee will please come to order.

Before the panel was rudely interrupted by this call of the House for a vote, let me ask Mr. Beck, how do most shippers know or find out if a motor carrier has filed a tariff and verify it as being quoted correctly?

Mr. BECK. Well, I think it's been mentioned, Mr. Chairman, that you do have the tariff watching services. In our particular case, we have a number of services that are under contract for those that we do not, it is the responsibility of my department and my staff to make sure that we receive a copy of the supplement publishing our rate prior to any use of that carrier's services for what they've quoted us, regardless if they send us a letter or not.

Sometimes there are changes made if I may give you a quick example of one particular case, we negotiated a rate, we got a copy of the tariff from the tariff publishing bureau, which pay to watch for our tariffs. We started using the carrier and were paying the rate published about four months after we began to use this service.

Unbeknownst to us, the carrier inserted a clause into its separate rates tariff which said if we did not pay the bills within a certain time limit, we would revert back to class rates, and that the negotiated rate would not be applicable.

That carrier went bankrupt. Unfortunately, the tariff bureau that were paying for tariff supplements never sent us a copy of that supplement; therefore, we never knew that rule was put in there. We were liable for those undercharge claims.

Mr. MINETA. Other than in that example, generally, how long would it take to verify the filing and the accuracy of a rate?

Mr. BECK. I would say it takes from 30 to 60 days. We had one recently where we asked the carrier to file a particular rate, it acknowledged that it was filing the rate, and it took me almost five months to get a copy of the tariff which published the rate, and the effective date of that tariff was five months after the carrier said it was going to publish our rate.

Mr. MINETA. And the reason for that delay?

Mr. BECK. The only explanation I recieved was that there was a volume of rates that it was having to publish. Merely overlooked the situation and regretted that they hadn't published the rate in a timely manner. I was fortunate that I did not use their services until we got the tariff that showed that the rate was published, so I wasn't subject to any undercharge claims in that situation.

Mr. MINETA. Was that from the carrier or a contractor?

Mr. BECK. That was the specific carrier publishing their own tariff.

Mr. MINETA. Now, under the 1980 Act, there is more freedom for carriers to operate both as contract and common carriers. Do you think shippers will attempt to move more of their goods by a contract carrier services since there is no filing requirement for contracts, and if this does occur, would this not minimize or perhaps eliminate the great filing problem that is occurring in the common carrier segment of the market?

Mr. BECK. Well, first, I would think there would be more shippers who would change to contract carriage. The statement was made this morning by the RCCC that approximately 80 percent of its members, in addition to having common carriage authority, also had contract authority, so I am certain that those that are dealing in the area of the common carrier will switch over to contract.

I think that this would eliminate a lot of the filing of tariffs made at the Interstate Commerce Commission, if that was the second part of your question.

Mr. MINETA. Mr. Moore, the common perception of the current problem is that it was caused by carriers not filing the negotiated rate. On page 2 of your statement, you list other causes. How widespread are these other causes?

Mr. MOORE. Mr. Chairman, with your permission, I'd like to defer to counsel on that question.

Mr. SWEENEY. Yes, sir, I'm handling a number of the undercharge cases for the shippers in various jurisdictions, and I would say that most of the collection claims that are being filed are on the basis of technicalities, rules, ambiguities, things of that nature, and not on the basis of unfiled tariffs.

I'd like to add to the prior response to the question how about sliding over from common carrier tariffs to contracts, the latest phase of the activity of the collection agents has been that they are now turning their focus on the contracts, and they're examining the contracts under a magnifying glass and making claims that the contracts did not fully meet all of the ICC specifications and therefore were not valid, and then they throw the contracts out, and they say, "You're out of the contract, now you have to go to the common carrier tariff and pay the high rate from the common carrier tariff without a discount."

So they get you coming and going. A lot of shippers that thought that they had retreated from the problem of fooling around with all these rules and everything that they're going after them with and went into the contracts are now finding that they're chasing them on their contracts.

Mr. Mineta. Mr. Moore, is your experience with the National Small Shipments Traffic Conference any different as it relates to trying to verify the rates quoted by carriers and whether or not they have actually been filed at the ICC? Time element problems, et cetera?

Mr. Moore. Mr. Chairman, I think that our membership has experienced essentially the same problems that you've heard described here today. Most of our members that do check on those things follow through with tariff watching services, same as others.

Mr. Mineta. On page 2 of your statement, again, you provide a list of the types of undercharge claims. Which of those types listed would be covered by section 1 of H.R. 3243 and which would be covered by section 3?

Mr. Sweeney, maybe you could help us out on that.

Mr. Sweeney. Well, I think that the effort in the bill is to cover all those kind of situations by talking about not only tariff rates but also tariff practices and tariff rules. The most common basis that people are undercharged for now in these cases is rules, some kind of a rule. I think the other witness said that he didn't even know the rule was there, and all of a sudden the rule was cited as taking away all of the rates. So the intent of the bill would be to take care of all those situations.

Mr. Mineta. Counsel was just pointing out to me one is permanent, one is temporary and restricted to 18 months, since section 1 is the 18-month——

Mr. Sweeney. Section 1 is the 18-month section which has to do with when an undercharge is filed, typically, an undercharge suit would be filed against a shipper. Section 3 relates the situations where a mistake has been made, and either the shipper or the carrier discovered it, and they both realized voluntarily that equity has to be done, and they would ask that the rates be approved at the level that they had agreed to in the first place.

The difference between section 1 and section 3 is that section 1 is aimed at taking care of carriers who, particularly in a bankruptcy situation, are trying to take advantage of the situation and going after the shipper. They're not willing to go to the ICC and make the filing under section 3 and say, "Well, we want the rates to apply, the rates that we agreed to." It's a different kind of situation. Section 3 is by mutual consent and good will on both sides. Section 1 is to take care of the situation when the bankrupt carrier is coming after the shipper with an axe.

Mr. Mineta. And the shipper's role in that instance?

Mr. Sweeney. The shipper's role in the first instance? The shipper's role in the first instance is that all of a sudden he gets a summons and complaint, and he's brought into court as a defendant in a lawsuit, and his next step is that he would then ask that the question be referred to the ICC as to whether there was an unreasonable practice by the failure of the carrier to publish the rate that they both understood applied to the shipments.

So the case then gets to the ICC, and the ICC would be asked to find that there's an unreasonable practice, and if the various circumstances occurred as are specified in section 1, then the ICC could find that there was an unreasonable practice. In other words, the shipper gets relief if there is some unreasonable practice in connection with the rate.

Mr. MINETA. Mr. Duncan?

Mr. DUNCAN. Mr. Beck, early in your testimony it says that we are here today to deal with a major threat, a threat that needlessly could add hundreds of millions of dollars to the national freight bill without producing any benefit for the national transportation system. Do you mean by that that a great percentage of the freight that is hauled in this Nation today is being carried at rates that are not filed or that are underfiled or something of that nature?

Mr. BECK. No, not necessarily. I think there is a pretty large percentage of rates that are under contract agreements. However, there is a big percentage of smaller shippers for whom probably this is just the tip of the iceberg. Also, Mr. Sweeney mentioned the fact that even the contract agreements are being explored by some collection agencies to make sure they comply with the ICC regulations, for contract agreement.

Mr. DUNCAN. Well, when you say your estimate of hundreds of millions, is that what you're talking about as being the tip of the iceberg?

Mr. BECK. Yes, that is an estimate that has been made public. I am sure that it is a very small estimate of what the total cost could be in the long run if we have action of the bill.

Mr. DUNCAN. So what you're saying is if we don't do something it could conceivably amount up into the billions very shortly?

Mr. BECK. That could be very possible.

Mr. DUNCAN. All right. Thank you very much.

Mr. SWEENEY. The amount of money is in relation to the number of carriers that go into bankruptcy. As more carriers go into bankruptcy, the bill gets bigger, and $200 million is about the cases that are out there right now. There are several recent bankruptcies of other carriers, and as they go into bankruptcy, the freight agents present themselves to court and start going through their bills and start building another stack of undercharge claims.

Mr. DUNCAN. Are there a large number of carriers in bankruptcy right now, Mr. Sweeney?

Mr. SWEENEY. There are a substantial number of carriers, and during the past few years, the number of carriers going into bankruptcy has been growing, and, as Mr. Harkins indicated, they recently had an extremely poor six-month period, which, if you could look at that and say, "Well, there's going to be even more bankruptcies coming up," and this is sort of how you get to the estimate of a billion dollars.

Mr. DUNCAN. Roughly how many carriers are in bankruptcy right now across the Nation? Do you know? Have you seen a figure like that?

Mr. SWEENEY. That's a number that I don't have, but there is going to be another witness on here, Mr. Augello, who keeps track of those kind of numbers, and Mr. Harkins, unfortunately for his group, has some figures on that, and he could give you that information. Anything I would guess at would be misleading. I could tell you it's over 100 anyway, probably several hundred.

Mr. DUNCAN. Are these primarily smaller carriers?

Mr. SWEENEY. They're all different sizes. They run the gamut from the largest size carriers down to the small carriers.

Mr. DUNCAN. All right. Thank you.

Mr. MINETA. All right. Well, thank you very much, Mr. Beck and Mr. Fortin, Mr. Moore and Mr. Sweeney, for being with us today.

[Mr. Beck's prepared statement appears on page 114.]

[Mr. Moore's prepared statement appears on page 188.]

Mr. RAHALL [assuming chair]. Our next panel is composed of Robert E. Davis, the President of the National Association of Freight Transportation Consultants, and Mr. William J. Augello, the Executive Director and General Counsel of the Transportation Claims and Prevention Council, Inc.

Gentlemen, we welcome you to the subcommittee. We have your prepared testimony, and it will be made a part of the record, and you may proceed as you desire.

Do you want to go first, Mr. Davis?

## TESTIMONY OF ROBERT E. DAVIS, PRESIDENT, NATIONAL ASSOCIATION OF FREIGHT TRANSPORTATION, CLACKAMAS, OR; WILLIAM J. AUGELLO, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, TRANSPORTATION CLAIMS AND PREVENTION CONTROL, INC., HUNTINGTON, NY

Mr. DAVIS. Thank you, Mr. Chairman.

Ladies and gentlemen, Mr. Chairman, thank you for having me. My name is Robert E. Davis, I'm President of Transportation Cost Control, a firm of transportation consultants located in Milwaukie, Oregon. I'm also President of the National Association of Freight Transportation Consultants.

Many people have thrown stones today as far as who has caused some of the problems that we're today confronted with. I believe the chairman of the Commission said that he wasn't aware that the ICC might have been a contributor to this problem in years past. I think that if you wanted to have a show of hands here you would find a lot of people that would certainly disagree with him. I think our current chairman has done a great deal to remedy the situation, but I think if we look back over the past few years, the ICC was a large contributor.

I think there are various reasons why we can look at the Commission as being one of the contributors. Certainly, the policy of, per se, anything goes led to the problem that we have today. We have secret account codes where no one knows who a particular account code is. The only one who knows, generally, is the carrier who goes out of business. When they go out of business, that list of account codes goes with them.

Signup or trigger sugar tariffs—Mr. Harkins of RCCC mentioned that they had filed a petition about two years ago, and they keep hoping that the Commission will come out with an answer on it—is another problem area that the Commission certainly could address.

One area that I think has been mentioned here, and an impression might have been left, is that this bill that you're being presented with, H.R. 3243, will eliminate the bankrupt carrier's right to file a balance due bill. That, of course, is absolutely not the case. Any legislation that you have before you would not negate their right to file balance due bills. It's simply going to give those that they're filing them against a remedy, hopefully, at the Commission.

I'm dropping much of my prepared statement, since I know my written statement will be entered into the file. One thing that I do have in my written statement is that both myself and NAFTC has objected in times past to the cutting of the statute period from 36 months to 18 months. We still don't particularly care for that, but an important thing at this time is that a bill be passed.

NAFTC has gone on record, as I also have, that we do support a legislative answer. It is important, and I would urge this committee, certainly, to consider it and hopefully pass it in this session.

A few things that the Supreme Court did point out that I think are very important, and I think, certainly, this committee should remember them, since there has been a great deal of talk about doing away with filed tariffs. Right now the Interstate Commerce Act provides penalties for violation of the Interstate Commerce Act, and the Supreme Court implied to us that those penalties should be applied. They pointed out that those that fail to publish could be subject to civil or criminal penalties. I, for one, wish that some of those penalties would be applied.

The ICC has permitted or created a situation where rate discrimination has or can occur. Again, this is the Supreme Court telling us that the ICC has permitted or created the situation. The Supreme Court also stated that protection against rate discrimination continues to be of paramount importance. Therein, I interpret that as their reaffirmation of the filed rate doctrine, certainly.

I really have nothing else. Thank you very much.

Mr. **Rahall**. Mr. Augello?

Mr. **Augello**. Thank you, Mr. Chairman, for the opportunity of discussing one of the most pressing transportation problems that has surfaced since the Motor Carrier Act of 1980.

To begin my testimony, which is on behalf of the Transportation Claims and Prevention Council, I would like to refer to my written presentation, which answers some of the questions that were raised by Congressman Duncan. Appendix A to the written statement shows a list of 131 carriers which have been filing undercharge claims against shippers based on negotiated but unfiled rates, but I might add also filed tariffs, which the auditors are claiming are invalidated by reason of rules in the tariffs, such as Mr. Sweeney referred to.

In addition, you will also see a list of the six Circuit Court decisions in the Circuit Courts which have supported the Commission's resolution of this problem and, of course, which were overturned by the Supreme Court based upon only one other Circuit Court, the Fifth Circuit, which overruled the Commission.

The total number of bankruptcies since the passage of the 1980 Motor Carrier Act has been reported to be in excess of 6,500 carriers. There are some studies available, as we have been tracking the motor carriers that have filed bankruptcies, and if the committee wishes to have that introduced later, I can arrange to have that done.

Mr. **Rahall**. We would appreciate that.

Mr. **Augello**. All right, I will do that.

[The information referred to by Mr. Augello appears on p. 239.]

Mr. AUGELLO. Our council wishes to emphasize the fact that it's not only vital to the entire shipping community that remedial legislation be enacted before adjournment, it is equally important that the right legislation be enacted, or we'll find ourselves right back before the Supreme Court once again. With this objective in mind, we respectfully suggest that H.R. 3243 with the several amendments agreed upon by the shipper/carrier/broker coalition must be enacted before adjournment if we are to receive any meaningful relief from pending suits.

The price tag on pending litigation could be not $200 million but approximately $300 million if pre-judgment interest is added. But the only beneficiaries of this decision, unless overturned immediately, will be the collection agencies and their attorneys, who retain approximately 80 percent of the amount recovered from the victims of this vicious practice.

To illustrate briefly how inequitable this decision is when applied to the real world of the 1980s, one need only consider that in some cases the record reveals that the very carrier officials who were responsible for creating the technical undercharges left the carrier's employ, formed their own auditing agencies, and then succeeded in getting a contract from the trustees so they could capitalize on their own violation of regulations.

Another disturbing factor is that these suits are only the tip of the iceberg, as has been mentioned several times, considering all of the new undercharge claims and suits which will be instituted for the carriers which have failed during the past two years. There are at least four or five major carriers that have filed for bankruptcy in the last 12 months. As to the number of suits involved, our figures indicate that there are probably between 3,000 and 5,000 suits pending and probably that many more which will be filed during the next few years.

The committee must realize that the filed rate doctrine is alive and well today, but it needs to be tempered by the ICC to take into consideration the manner in which the congressionally mandated competitive marketplace has operated in the formative years following the Motor Carrier Act of 1980.

In rebuttal to an argument which is certain to be raised by the collection interests, we wish to inform the committee that there has been no evidence or proof of secret rates having been negotiated for the purpose of discrimination. The only secrecy involved in these cases was the failure on the part of these defunct carriers to inform their shippers that they did not duly file the negotiated rate with the ICC or that they had attached rules and restrictions to those rates.

In view of the current budget crisis and Congress' efforts to reduce Government spending, it makes no sense whatsoever to sanction a decision which will result in the ICC's being inundated with thousands of new cases seeking a determination that the filed tariff rates were unreasonable or otherwise unlawful, which is a window the Supreme Court acknowledged exists for shippers.

Enactment of H.R. 3243, on the other hand, will save shippers the substantial cost of proving the unlawfulness of rates but, more importantly, will avoid Congress' appropriating millions of dollars needed for a new staff of administrative law judges at the ICC to process these cases. The ICC presently has only three administrative law judges which each handle approximately 50 cases a year. The ICC can fully expect at least 5,000 new cases to be referred to it within the next few months unless Congress acts quickly.

Most of the pending cases involve filed tariff rates which the auditors are attempting to invalidate with contrived interpretations and technical publishing violations. Only a portion of these cases, as Mr. Sweeney indicated, involve an unfiled negotiated rate which the carrier failed to file in violation of the law. It makes no sense to enrich collection agencies and their attorneys at the expense of shippers for these carriers omissions.

One point which bears repeating is the fact that the Supreme Court's decision serves no public policy and is counterproductive to the objectives intended by Congress in 1980. The small, unsophisticated shippers as well as the larger sophisticated shippers have been the victims of these practices which must be stopped quickly to avoid irreparable financial injury to large segments of the shipping community, and I include brokers in the shipping community. In my estimation, the broker community is the group that's going to be hardest hit by the filed rate doctrine as it's being interpreted and enforced today.

The committee's assistance in the form of an early markup of H.R. 3243 to facilitate quick enactment before adjournment is urgently needed. In closing, in answer to one of the committee member's questioning as to where the blame lies here, our council filed an Amicus brief in the Supreme Court in the *Maislin* case which contained evidence of the public statements some Commissioners were making during this formative period; specifically, counseling the shippers to go about their business as if there was no regulation and other policy statements about their enforcement policies during those years, which failed to mention the enforcement of rates or tariffs.

With the Chairman's permission, I would like to file as a part of this record those portions of the brief which document that information.

Mr. **Rahall**. Without objection, you may file that information.

Mr. **Augello**. Thank you, Mr. Chairman.

[The information Mr. Augello refers to appears on p. 239.]

Mr. **Rahall**. Mr. Augello, let me ask you, is it an easy matter to check whether or not a rate is being filed and, in addition, whether or not the rate being quoted is correct as included within the tariff?

Mr. **Augello**. During the regulatory reform period following the Motor Carrier Act of 1980, it was not easy, it was very difficult. The first thing that happened was that the Commission was inundated with new supplements and new tariffs. We have statistics here as to how the carrier industry grew from 16,000 to 40,000 almost overnight. Those carriers filed hundreds of thousands of tariff pages weekly, and the Commission has indicated statistics to that extent.

At the same time, the Commission was reducing its staff. They reduced their tariff staff substantially. Within a few years, the Commission announced that it could no longer scrutinize tariffs, so those tariffs went into the public file without any official looking at them, and it's for that reason that a lot of the tariff irregularities, errors and some of the rules that we've been talking about slipped into those tariffs without anyone knowing about them.

Mr. **Rahall**. Is it costly for a shipper to verify?

Mr. **Augello**. It certainly is. You can hire a private watching service, but that's very costly. If you take even the smallest shipper, if he knew what a tariff was, he would have to contract with one of these public services. They're very good, but they're also expensive. A large shipper simply couldn't afford to have every one of its rates checked every day to see whether there was a tariff published on every one of his movements. It's a monumental problem.

Mr. **Rahall**. Who did you say a shipper could hire to do such a job?

Mr. **Augello**. A private watching service.

Mr. **Rahall**. A private watching service.

Mr. **Augello**. A rate-checking service. They're housed in the Commission's building right at the public tariff file, but you've got to pay for that service, and it's an unnecessary cost of doing business.

Mr. **Rahall**. What's a ball park figure?

Mr. **Augello**. I think they charge $40 an hour. I know I just tried to get a couple of tariff pages, and it cost me $40, so I guess by the time you go down and get the tariff pages, pull it out, photostat them and put the file back, every time you ask for a rate it's going to cost $40. That's more profit than some people make on a truckload movement.

Mr. **Rahall**. On pages 3 and 4 of your prepared testimony, you list a series of unreasonable practices that have been carried out. How widespread are those practices and, in your opinion, do you believe any of those practices would be an acceptable defense of the filed rate doctrine?

Mr. **Augello**. I think all of these practices have been held by the Commission, before the Supreme Court's decision, to constitute an unreasonable practice.

Mr. **Rahall**. But they wouldn't be after the decision?

Mr. **Augello**. That's right. They can no longer be an unreasonable practice today, and that's our problem. We're faced with motions for summary judgment based on every one of these cases following the *Maislin* case, and that explains our need for emergency legislation. We can't fight these cases forever waiting for Congress to act. If Congress is going to help the shipping community, it must find the vehicle for doing so now, before adjournment.

Mr. **Rahall**. You further state that the Council cannot support any reduction of the statutory limitation for filing of overcharge claims. Why is that?

Mr. **Augello**. Well, our Council's members are the ones who are responsible for filing loss and damage, over charge claims, and our representatives voted not to support a reduction in the claims filed statutes, but they also voted not to oppose it if it means permitting this legislation to be enacted quickly. It's a fact of political life that everyone can't have everything. This bill is the most important transportation issue before the entire shipping community today. We urgently need this bill.

Mr. Rahall. Let me turn to you, Mr. Davis. As freight transportation consultants, does your group provide tariff filing services to its clients?

Mr. Davis. To a degree we do, sir. Many consultants, myself included, do subscribe to many individual carrier tariffs and to the various bureau tariffs. I caution my clients, however, that indeed it is a monumental task for one person or 10 people in anybody's particular firm to be able to take the time and sit down and review every single tariff page that comes through the office.

One big thing, and I think it was mentioned about a year and a half ago at Mr. Augello's then-Shippers National Freight Claim Conference annual meeting in Tampa, one member stood up and said one of the big things that's missing today, and I think indeed it is sad, is there's been a very sad loss of credibility from many motor carriers.

Where several years ago we used to be able to accept the word of a motor carrier representative that what they were doing, they were going to do, and indeed it was done, I now constantly caution my clients not to do a thing, and those that listen to me, fortunately, have not been hurt too bad by the bankrupt carrier problem. Don't do anything until you get those filed pages. Keep them. And, of course, we ask them to give us a copy. It would be an extremely difficult task to monitor every tariff filing.

Mr. Rahall. What do you propose should be done to alter the pending legislation in order to alleviate the bankrupt carrier due bill situation in view of the Supreme Court decision?

Mr. Davis. To alter the pending legislation? I think the wording in Section 1 of the original legislation was worded or addressed the unreasonable practice, and, of course, the Maislin decision kind of squashed that. We need now for the Commission to be able to address the issue from the global standpoint instead of the individual cases that people have been talking about, the individual unreasonable rate, or attacking each individual balance due bill situation. I believe the revised legislation—Mr. Augello has a copy here—is something that, yes, as consultants we agree that Section 1 of that would, as you know, offer the assistance that the shipping public needs.

Mr. Augello. If I may interrupt, that's the same coalition version that I think Mr. Moore said was attached to his statement. It's the NIT League/NASSTRAC, ATA coalition, isn't it?

Mr. Davis. Yes, it is that coalition bill.

Mr. Rahall. The chair recognizes the gentleman from Tennessee, Mr. Duncan.

Mr. Duncan. Thank you, Mr. Chairman. Mr. Augello, you've given some amazing testimony here today. You say that, in your estimation, the cases of the ICC administrative law judges who have been handling an average of 50 cases per year that we could see as many as 5,000 cases just in the next few months. Is that correct?

Mr. Augello. Absolutely.

Mr. Duncan. Would all those cases arise out of this bankrupt carrier situation?

Mr. Augello. Yes, but it's not limited to bankrupt carriers. It's primarily bankrupt carriers, but it's any defunct carrier. In some cases, these carriers have closed their doors, not filed for bankruptcy, but then sold their bills to an audit agency, or they filed the claims themselves.

Mr. DUNCAN. Well, what I'm getting at, you're talking about 5,000 cases out of carriers that are bankrupt at this time, and, of course, this is a situation that could continue into the future and even possibly escalate if the economy had problems, and it could grow much worse.

Mr. AUGELLO. That's correct. It's going to increase within the next two years, because, as I said, there are at least four major carriers that have filed for bankruptcy in the last year, those bills are being audited right now, and the auditors can go back three years from the date of movement, and the trustees get an additional two years within which to bring suits on those three years bills. So this situation is going to string out for the next five years unless Congress stops it.

Mr. DUNCAN. Well, let me ask you this. You know, of course, some non-controversial bills get through in a very short time, but some of our major legislation it takes years of work. The Americans with Disabilities Act was one of this committee's jurisdiction, and I believe we heard testimony that they started working on that bill in 1982, and it will be signed by the President next week, and we're rushing things through now trying to get out for an August recess, and then we're talking about coming back for just a short time before the elections. What, in your judgment, would be the consequence if we didn't get this enacted this session of Congress?

Mr. AUGELLO. The consequences would be that the shipping public will have to finance the continued defense of these suits before the courts, trying to get the case referred to the Commission. We'll have to convince the court that we have a rate reasonable issue involved. There are many other defenses available such as a tariff interpretation matter, which is not an unfiled rate but it's a dispute with the auditors as to what the tariff really means. There are also intrastate issues involved.

There are many other incidental issues which are all wrapped up in many of these cases, but it means that we're going to have to continue to defend these cases, get them referred to the ICC, prove the case of rate unreasonableness before the ICC, then the Commission will send it back to the court where it will be reviewed again—we're talking about years of litigation and a tremendous expense, which is wholly unnecessary.

In our view, there is complete agreement by all of the parties that are directly affected or directly participated in the transportation contract. You have the motor carrier industry, you have all the shippers, you have the brokers, and you have the transportation consultants, all in agreement that this bill is needed.

Mr. DUNCAN. Let me ask you this. You made one comment during your testimony that I wondered about. You said the filed rate doctrine was alive and well.

Mr. AUGELLO. That's correct.

Mr. DUNCAN. That would imply to me that you support the filed rate doctrine, and yet you said at another point that it was almost impossible, or it was maybe not impossible but it was extremely difficult, time consuming, expensive, for a shipper to find out what these rates are. Now, what did you mean by that exactly?

Mr. Augello. What I meant is that the Commission has not repealed the filed rate doctrine. It is still in effect. The Supreme Court has reaffirmed that. The Commission has never indicated that it has repealed the filed rate doctrine. What I meant is that the Commission has the power under section 10701 to find that that filed rate is unlawful by reason of the carrier's practice in connection with the rate. It has always had that power. There has just been a dispute as to whether or not the Commission could, in the 1980 era, set aside the filed rate by reason of a carrier's practices.

Mr. Duncan. Let me ask you this. Before I got here this morning, apparently, there was some testimony or some questions asked about the possibility of doing away with the ICC altogether. Now, I'm not talking about that, but would it be better, in your judgment, or worse instead of having a bill such as is before us, which is pretty technical and pretty complicated, just some simple bill that says the ICC shall have no authority or no jurisdiction over rates charged by carriers to shippers whatsoever.

Mr. Augello. It would never pass. It wouldn't give us any relief. You see, this morning's discussion was very interesting but, I felt, very untimely, because we have an emergency situation, we have a narrow bill which must be addressed, and we really need relief now, not next session. So another time we can have that philosophical discussion.

Mr. Duncan. All right. Thank you very much.

Mr. Davis. If I may, sir, I would like to agree with Mr. Augello, certainly, that the issue whether we do or do not have filed tariffs certainly is something that shouldn't be bantered about too much now. We have a law; I certainly wish that those laws would have been upheld, but they weren't, and I think it is, just as Bill said, very urgent that we do something just as soon as possible.

Mr. Rahall. Thank you, gentlemen.

[Mr. Davis' prepared statement appears on page 130.]

[Mr. Augello's prepared statement appears on page 89.]

Mr. Rahall. Our next witness is F. Wayne Elggren, CPA, representing the Creditors Alliance to Preserve Freight Undercharge Assets.

Mr. Elggren, we welcome you to the subcommittee. We have your prepared testimony, and it will be made a part of the record as if actually read, and you may proceed as you desire.

## TESTIMONY OF F. WAYNE ELGGREN, CPA, CREDITORS ALLIANCE TO PRESERVE FREIGHT UNDERCHARGE ASSETS, LOS ANGELES, CA, ACCOMPANIED BY JOE STEINFELD, ATTORNEY, AND JUDY WOODS, SPECIAL COUNSEL TO THE UNSECURED CREDITORS COMMITTEE OF OVERLAND EXPRESS

Mr. Elggren. Thank you, Mr. Chairman.

Mr. Rahall. For the record, would you identify the individuals with you, please?

Mr. Elggren. I would be happy to. My name is Wayne Elggren. With me today is Joe Steinfeld, an attorney with the Creditors Alliance to Preserve Freight Undercharge Assets, and Judy Woods, who is Special Counsel to the Unsecured Creditors Committee of Overland Express, a bankrupt company. I might interject at this point that we're appreciative of the opportunity of expressing our view on this very complicated issue.

My firm was bankruptcy trustee for IML Freight, a less than truckload common carrier. I've been recently retained by the bankruptcy trustee of Transcon Lines, a Los Angeles-based less than truckload common carrier. IML operated in 30 States, had 2,000 employees, and annual revenues of $200 million. Transcon operated in 45 States, had 4,000 employees, and annual revenues of $340 million.

There have been thousands of trucking company bankruptcies in recent years. In many trucking company bankruptcies, such as Transcon and IML, undercharges become an essential asset to pay employee wages, health care benefits, pension benefits, taxes, both State and Federal, trade and other unsecure creditors.

In the bankruptcies where undercharge audits have been, the number of undercharges represent a small fraction of the shipments which actually take place. For example, the $3 million of undercharges discovered by IML represent less than one percent of the company's revenue, and in the case of Transcon, estimated undercharges represent two percent of the company's revenue for the three years before the filing of the bankruptcy petition. Thus, 98 to 99 percent of all shippers' bills are properly billed and paid.

Nevertheless, the undercharges are tremendously important to bankruptcy trustees and toward the payment of creditors of these estates. There's a popular misconception that many small shippers bear the brunt of undercharge collections. In the case of Transcon, a substantial portion of the undercharges appear to be owed by Panasonic, Sony, General Motors, Dupont, General Electric, and IBM. While some small shippers do owe undercharges, they rarely receive the benefit of secret discount pricing and usually pay their full tariff rate.

At IML, the undercharges collected have been and will be distributed to employees, taxing authorities and unsecure creditors. Thirty-three percent of these funds, or close to $1 million, will be used to make contributions to employee pension plans. As a result of collections of undercharges, IML made payments to pension plans covering employees in 30 States and to the Pension Benefit Guarantee Corporation, thereby relieving the Federal Government of that liability.

In Transcon, approximately 80 percent, and this is based on preliminary claims that have been filed with the bankruptcy court, of the undercharge money could go to employees and their pension plans. Eighty percent of that money could go to employees and their pension plans. Most of the 4,000 employees have claims for unpaid wages, health care benefits, and pension benefits, many of which will go unpaid if undercharge assets are not collected by the bankruptcy trustee. These employees' wage claims include $18 million for an unpaid payroll for the last two weeks after Transcon terminated its operations.

The duty to file rates has always been considered by Congress and the Supreme Court as essential to preventing price discrimination and preventing other kinds of abuses. In both IML and Transcon, as well as nearly every other carrier bankruptcy, collection of undercharges enables bankruptcy trustees to pay employees, State and Federal taxes, and thousands of small unsecured trade creditors.

This committee should be aware that the filed rate doctrine is not a one way street. In both the IML and Transcon cases, shippers have made or are making claims for tariff overcharges on billings made during the three years before the filing of their bankruptcy petitions. I might interject that these overcharges are based on technicalities just as undercharges are many times based on technicalities.

Valid overcharges become allowed bankruptcy claims against the carrier. These claims are generally pre-petition unsecure claims and create an offset against any amounts owed by the shipper to the carrier. Because of competitive pressures, both these carriers paid shippers overcharge claims up to the time they filed for bankruptcy and seldom made demand for undercharge claims.

In the case of Transcon, over $6 million was paid out to shippers during the three years before the filing of the petition. I might also add that in the case of McLean, there was $13 million of overcharge claims that was paid out before the filing of the petition. Shippers have now filed tariff overcharge claims against Transcon totalling about half a million, but that number will grow dramatically as time goes on.

In the IML case, shippers made claims for overcharges of approximately $2.5 million. Many of these claims were paid out of offsets against the amount shippers owed IML or from bankruptcy assets. It is totally one-sided for Congress to disqualify carriers, as contemplated in H.R. 3243, from making claims against shippers for tariff undercharges while shippers continue to collect overcharges from carriers. The requirement to file and pay tariff rates is vital to the prevention of price discrimination and the efficient and orderly interstate shipment of goods.

Price discrimination favors only big shippers. Unless filed rates are honored, it is almost impossible to ensure that rates are fair, reasonable and non-discriminatory. The filed rate doctrine has worked well for 100 years. Proper ICC enforcement of the law will ensure that all shippers, large and small, in all States have access to transportation services at fair and reasonable prices.

Although we believe no change in the law is needed, if you do decide to make a change, it should apply prospectively and not retroactively to already pending claims and bankruptcy cases. H.R. 3243 applies retroactively and would apply to cases already pending in both District Courts and before the ICC. Retroactive application of any change to the tariff filing requirement would have devastating affects on several thousand bankrupt trucking companies and the hundreds of thousands of creditors of these companies.

In addition to the serious legal questions raised by any such action, every pending court case would be nullified. Any change to the requirement to publish and pay according to filed rates should equally apply to shippers and carriers. There should be no different treatment for shippers collecting overcharges and carriers collecting undercharges. Many shippers have already been paid for tariff overcharge claims by bankrupt carriers. Elimination of the carrier's right to recover valid tariff undercharges will be totally inequitable.

In conclusion, Mr. Chairman, let me say that we have heard a lot today about the mom and pop shipper. Some have tried to imply that they are the issue. Nothing could be further from the truth. If every undercharged bill against the mom and pop shipper were voided this afternoon, the impact on the amounts bankruptcy trustees expect to collect would be negligible. The money to be collected is from sophisticated Fortune 500 companies, and the money to be paid out will go to thousands of former employees whose last paychecks bounced, to their pension plans, to Federal, State and local taxing authorities, and, perhaps most importantly, to the thousands of small businesses who are unsecure creditors in these trucking bankruptcies.

Mr. Chairman, in Transcon alone there are 617 former employees in California who are owed several million dollars of unpaid wages.

Mr. Duncan, we have approximately 180 former employees in Tennessee who are owed over $500,000.

And, Mr. Rahall, in West Virginia, there are four employees who are owed—I notice they have both left—in the tens of thousands of dollars.

Mr. Chairman, both the law and the equities favor the collection of these outstanding amounts. The Creditors Alliance strongly urges opposition to the shippers' bail-out bill. Thank you.

Mr. BORSKI [assuming chair]. I'd like to thank the gentleman for his testimony. We must leave for just a few moments. There is a vote on at the House, and we will return as soon as possible.

[Recess.]

Mr. BORSKI. The committee will reconvene.

Sorry for the delay, Mr. Elggren. As an expert in bankruptcy matters, can you tell us if there is any legal parallel to the filed rate doctrine in any other segment of the Nation's business community? If there is, can you tell us if those industries have been subject to similar claims in bankruptcy proceedings?

Mr. ELGGREN. This is the only industry which I participate in a bankruptcy setting in which this type of an asset or type of a situation arises.

Mr. BORSKI. All right, sir. In your statement you discussed the disposition of assets in two bankruptcy proceedings, namely, IML and Transcon. In Transcon, you list approximately $42 million in claims for wages and pension funds. How was Transcon able to defer such a large amount of payments to its employees?

Mr. ELGGREN. There were a number of things that happened in Transcon. One was that a sale of the operations of Transcon occurred in April of this year. As part of that agreement, there was a deal to pay all employees two weeks of severance pay. In addition, there were other checks that were issued for employees who continued on after the sale of the operation that bounced because there were not funds.

The International Brotherhood of Teamsters filed an $18 million claim representing a claim by the employees for that two-week period. The others amount to about $2 million to $3 million of the bounced checks I referred to.

Mr. **Borski.** How did they defer payment to the pension fund?

Mr. **Elggren.** They just didn't pay them. Eventually, what happened was the pension plans filed an involuntary petition against Transcon, and that's why they went into bankruptcy. It was because of the non-payment that that occurred.

Mr. **Borski.** You say there are approximately $20 million in undercharge claims in the Transcon situation. Can you give us some idea of how such a massive freight bill was able to accrue? If you collect the entire amount, how much or what percentage of the $20 million will go to pay unsecure creditors, and what percentage, if any, will go to secure creditors?

Mr. **Elggren.** I will try to answer that as best I can based on the information we have at this point. The case was filed in April of this year, so there's a lot of unknowns at this point.

First of all, as I mentioned in my oral testimony, $20 million represents approximately two percent of the total revenue of the company for the three years before filing the bankruptcy petitions, so it is amassed out of a lot of transactions, but it is a very small percentage of the total revenue that went through the system, so to speak.

That's part of your question. If you could ask me the second part, maybe I could focus on answering that.

Mr. **Borski.** If you collect the entire amount, how much or what percentage of the $20 million will go to pay unsecure creditors, and what percentage, if any, will go to secure creditors?

Mr. **Elggren.** None would go to secure creditors. There are not secure creditors that would have a claim against that. Unsecure creditors, that is going to depend on a number of things, including what other assets can be brought back into the estate, which, at this point in time, are fairly meager as far as what are generally referred to as hard assets; that is, an asset that you can go out and quickly sell and turn into cash.

There are a lot of claims against related companies who receive payments before the petitions. Those would have to be recovered, but assuming for a moment the major asset that would be recovered are the $20 million of undercharges, they would go first as the bankruptcy priority sets forth to administrative claims, and I can come back in just a minute and make a comment about that.

Second of all, after administrative claims are paid, employees are allowed a $2,000 per employee priority for unpaid wages that arise during the 90 days before the petition. There is also a priority, again to a maximum of $2,000, for unpaid pension plan contributions per employee. The balance becomes an unsecure claim as any other unsecure claim. The $20 million, of course, after paying administrative claims, would first go to pay those priority claims of wages; in addition, there are other priority claims such as taxes that are paid in a priority order.

As far as the administrative costs, I heard a little earlier somebody testify that 80 percent of the money that is recovered goes to attorneys and other administrative costs. I'm not sure where the gentleman found that information. In the IML situation, I directed a group of employees within the company who were rate auditors in investigating and doing the rate undercharge investigation. That cost, plus the cost of attorneys for pursuing those claims, amount to approximately 30 percent in total of the claim.

I'm currently assigned by the trustee of Transcon to evaluate proposals that have been presented from various sources to do the audit on the Transcon situation. Those percentages and my estimate of what it would cost is anywhere from around 35 percent up to 60 percent. Those are the range of the proposals that occur. I'm not exactly sure, as I said before, where the gentleman with 80 percent is coming up with that number.

We in the fiduciary capacity obviously look at the cost-benefit of proceeding after these things. If there's no benefit to do it, then we don't proceed after it, but these are very important monies to pay unsecure creditors.

Ms. WOODS. If I might add something as well, being a bankruptcy attorney myself and also representing another bankrupt carrier, in every case, the application to employ these auditors and these attorneys is something that is approved by the bankruptcy court after notice and hearing, and not only is that approved on the front end, but later in the case when the settlements are to be approved, where it requires bankruptcy court approval, and before the attorneys are paid, even though their employment was preliminarily approved by the court, before the fees do get paid, it is again subject to review by the bankruptcy court on a notice and hearing basis, so there is a two-step review process, and the cost-benefit analysis is something that's taken into consideration at every step of that two-part process.

Mr. BORSKI. Okay, I have one final question for you. Do you think that a shipper should have any defense to a claim that stems from a claimant's intentional failure to comply with regulatory laws?

Mr. ELGGREN. Intentional? I suppose from our viewpoint the benefits of the process that as trustees we go through in recovering these undercharges is that I guess we help to prevent the discrimination that tends to occur against other shippers that arises out of whether or not there's an intent on the part of a carrier to file or not file that. Basically, we in many respects are acting as the enforcement arm of the ICC over these last years, because they haven't enforced it.

Mr. STEINFELD. Congressman, if I can just speak a quick second on that, first of all, it's never in a bankruptcy scenario up to the creditors to bear the burden of intentional conduct of the debtor, and often times preferential transfers are collected that might have even been fraudulent or intentional on the part of the debtor, and they're taking from perhaps "innocent" recipients of those preferences, and perhaps that's a good answer to your first question about is there any parallel out in the industries of this country about something like the filed rate doctrine. I would suggest that any type of preferential payment is the same thing. The rule has nothing to do with intent. It has to do with whether or not, in this case it would be, a creditor of the State had received a payment within a 90-day period, and it doesn't matter if they relied on good faith or not.

Mr. BORSKI. Okay, we'd like to thank you for your contribution, and sorry for the delays.

[Mr. Elggren's prepared statement appears on page 145.]

Mr. BORSKI. We're going to have to ask the next panel to just bear with us for a few moments. There's another vote on, and the subcommittee will stand in recess.

[Recess.]

Mr. BORSKI. The subcommittee will come to order.

The next two witnesses are a panel, the Honorable Ronald A. Sarasin, President of the National Beer Wholesalers Association, a former member of Congress from Connecticut, and Mr. Pat Scruggs, who is the President of Beverage Control, Inc.

Gentlemen, we want to thank you for your indulgences, and particularly Mr. Sarasin. I'm sure you understand what can happen around here from time to time, but we do appreciate your patience in waiting, and your statements will be a part of the record, and you may proceed in any fashion you wish.

Mr. SARASIN. Mr. Chairman, thank you. Mr. Scruggs has a airplane connection to make, and with your permission, I would ask him to go first.

## TESTIMONY OF PAT SCRUGGS, PRESIDENT, BEVERAGE CONTROL, INC., KNOXVILLE, TN, ON BEHALF OF THE WINE AND SPIRITS WHOLESALERS OF AMERICA

Mr. SCRUGGS. Thanks, Mr. Sarasin.

Mr. Chairman, my name is Pat Scruggs, President of Beverage Control, Inc., of Knoxville, Tennessee, and we're a small wine and spirits distribution company in business continuously since 1961, with 31 employees. I appear before you today representing the members of the Wine and Spirits Wholesalers of America as well as all of the many firms whose economic well-being depends largely upon your expeditious action on the matter before your subcommittee.

I realize you have listened to a lot of important testimony today; however, my testimony is a first-hand experience. To illustrate our specific case, in 1985, Express Transportation Company of Chattanooga, Tennessee, solicited our business and submitted their published price list. A copy is attached to the testimony. This was to haul wine from California to Knoxville.

I'd like to point out that this particular price list was not a negotiated rate. It was a rate that was submitted to us to solicit our business; it not only included Knoxville, it included other towns in Tennessee, Virginia, Missouri, North Carolina, South Carolina and such. It was a rate quoted to us to solicit our business and not a negotiated rate.

We purchased their services over a three-year period and paid every one of their freight bills exactly as quoted and billed. Then in January of 1989, we received a letter from a Washington law firm stating that they had been retained by a bankruptcy trustee to pursue immediate legal action against our company in the amount of $129,007.15 for undercharged rates.

Now, I also have an explanation or a copy of their request of ours. In one freight bill, they charged us $243.75, which we paid, and they are requesting $739 more. This is almost two and a half times the original rate quoted. In another bill I have in front of me, we were billed $876.37, which we paid, and they now want $1,415.63 additional.

We were told that Express Transportation had failed to file the rate with the ICC as required by law, and we were liable for the differences. At no time during our business relationship with Express Transportation Company did we realize that it was our additional responsibility to verify that Express was complying with ICC law. It is difficult for me to understand a law that makes me responsible for another business not adhering to the law. This cannot be what Congress intended.

As you can see, the June 21st *Maislin* v. *Primary Steel* decision has created a real crisis for me and my business, and I am not alone. Five of my colleague companies in Tennessee alone face similar devastating consequences. Our inability to factor these unanticipated expenses into the framework we have used to determine our cost of doing business years after the fact will have catastrophic affects on us and our employees.

It would seem that unless Congress quickly remedies our situation, virtually hundreds of shippers, large and small, will be forced to pay millions of dollars in additional freight charges. As a small businessman, I can ill afford to be penalized for such an enormous, unexpected, deferred and unreasonable burdensome billing as that which I am faced with today.

In summary, I would just emphasize once again that our freight business was solicited at a rate quoted by Express Transportation, and in trying to be good business people we entered into a bona fide agreement for a fair and reasonable rate, the same as did hundreds of others of independent businessmen and women. A rate was quoted, we were billed for that exact rate, and we paid those bills in full.

This inequity should be corrected, corrected promptly, and provide remedy to myself and hundreds of other business people. Thank you again, Mr. Chairman and members of the subcommittee, for your time and consideration. I will be pleased to answer any questions.

Mr. MINETA [resuming chair]. Thank you very much, Mr. Scruggs, for your testimony. Let me ask, on page 1 of your testimony, you outline a specific instance in which your company was billed for $129,007.15 for undercharged rates from a bankruptcy trustee for Express Transportation Company, which you had done business with before they filed bankruptcy. Had you signed any type of agreement with that carrier?

Mr. SCRUGGS. Signed an agreement?

Mr. MINETA. Did you sign any type of agreement with the carrier?

Mr. SCRUGGS. No, sir, we just relied on their printed quoted freight rate schedule to us.

Mr. MINETA. And did the carrier ever tell you that its transportation rates were on file as required by law?

Mr. SCRUGGS. I don't recall whether that ever happened or not.

Mr. MINETA. For the record, what did you do with the bill?

Mr. SCRUGGS. With which bill? The $129,000 one?

Mr. MINETA. Yes, sir.

Mr. SCRUGGS. Mr. Chairman, I can take care of the $7.15, but the $129,000 is still being litigated.

Mr. MINETA. Very well. Well, recognizing that you have a plane to catch, and I know that Mr. Duncan was hoping to be back to be able to be here, but he did want me to express to you his appreciation for your being here as well.

Mr. SCRUGGS. Thank you.

Mr. MINETA. So, again, because you have a plane to catch, feel free to leave at this point.

Mr. SCRUGGS. Thank you very much, Mr. Chairman.

Mr. MINETA. We're pleased to hear from our very fine former colleague—there is a life after Congress, I guess—our colleague from Connecticut, Ron Sarasin.

Ron, if you would go ahead and make your presentation.

## TESTIMONY OF RONALD A. SARASIN, PRESIDENT, NATIONAL BEER WHOLESALERS ASSOCIATION, FALLS CHURCH, VA

Mr. SARASIN. Thank you very much, Mr. Chairman, and thank you for providing the time for me to register the support of beer wholesalers for the enactment of H.R. 3243. We asked for this opportunity to testify because we think we can provide a good collective example of how the "Catch 22" situation that's created by this rate undercharge issue has a potentially devastating impact on many small businesses, not just in our area.

The majority of the 4,000 beer wholesale companies in the cities and towns throughout the country are small family-owned and operated businesses. Transportation plays a very important part in the day-to-day conduct of their business, principally in the form of supplier product from regionally sited breweries to beer wholesalers. More often than not, these shipments move in interstate commerce.

While the beer wholesaling industry is transportation intensive, you couldn't describe management as being expert in all the nuances of transportation law and regulation. Terms such as "unpaid tariff charges" and "filed rate doctrine" are being heard by some beer wholesalers for the first time during motor carrier bankruptcy proceedings.

Beer wholesalers may not be experts in transportation law, but they know an injustice when they see one. Let me quote from a letter written by Pete Harrelson, a beer wholesaler in La Grange, Georgia, who was sued for $12,247.31 for past undercharges. Pete writes,

> We have fought this suit for over two years, spent over $10,000 in legal fees and countless hours of time because it just ain't right to pay these vultures. Everyone always states pay, don't go to court; however, sometimes you need to stand up for what's right.

Other beer wholesalers face much larger liability. For example, Ed Perry, a beer wholesaler in Augusta, Georgia, who dealt in good faith with his carrier but now is confronted with a bill of more than $100,000 for so-called undercharges, and I have no doubt that beer wholesalers across the country face similar liabilities, although they may not yet be aware of it.

Mr. Chairman, to give the committee a better understanding of the problem, I would ask that a number of letters from Georgia beer wholesalers be printed as part of the hearing record.

Mr. **Mineta**. Without objection, so ordered.

[The letters referred to by Mr. Sarasin appears on p. 220.]

Mr. **Sarasin**. Mr. Chairman, if during the consideration of H.R. 3243 you're tempted to conclude that the mess created by rate undercharges is the result of haggling over price between scofflaw shippers and carriers, I hope you will counter this temptation by recollecting the beer wholesaler experience, and I'd like to use the balance of my time profiling several characteristics of brewer wholesaler motor carrier transportation arrangements which justify the type of relief provided by this bill.

One: common versus contract carriage. The constant flow of traffic between brewers and wholesalers has resulted in the utilization of all shipper carrier options. We found that many of our members utilize contract and common carriage to meet their needs. Because wholesalers order truckload and less than truckload shipments, we're finding that since 1980 our members may have utilized the same carrier for both common and contract carriage. Unaware of any pitfalls between the two options, a wholesaler asking for a contract rate with a similarly uninformed common carrier may have been told, "It's easier for me to bill you per 100 weight for the same price," thereby triggering shipper liability for rate undercharges.

Two: ghost carriers and real liability, and I repeat it's incumbent upon the beer wholesaler to arrange for transportation of his shipments from the brewery. However, this does not mean that a shipment always moves by the carrier designed by the wholesaler. We're finding that in the interest of efficiency and responsiveness to wholesaler orders, brewery shipping docks often consign shipments to the first available carrier.

The brewery-selected carrier must agree to a rate specified in the original order, thus the wholesaler has incurred liability to a carrier he has never negotiated with and perhaps never heard of. Therefore, again, our members are unaware of the extent of the liability they've incurred through their own activity and are certainly unaware of potential liability incurred without their participation.

America's warehouse, which is what the higher trucking industry, common and contract carriage, have often been called, and beer wholesalers who deal with food product inventories with a limited shelf life rely on the entire warehouse on wheels, common and contract carriage, to serve their transportation and inventory management needs. To have access to one part of the system without the other would be turning back the clock, and we're hopeful the committee will move legislation which addresses the wrong that confronts our members who have incurred financial liability for rate undercharges and restores our confidence in the common carrier segment of the motor carrier transportation system.

Mr. Chairman, I thank you for your attention and the opportunity to testify here today.

Mr. **Mineta**. Thank you very, very much. Ron, do you have any assessment of the number of undercharge claims that are being made against members of your association?

Mr. **Sarasin**. We do not yet, Mr. Chairman. We are aware of a number of them. The first trigger for us, were letters we received from wholesalers in Georgia primarily because of one carrier that went bankrupt and happened to do a lot of carriage for beer wholesalers. So I don't know what the enormity of the problem is. I've heard the number up to $200 million, and I wouldn't be surprised if it's that or higher when you consider all the industries.

I think we have to point out that we're not talking about technicalities here, we're talking about a negotiated agreement between an understanding carrier and an understanding shipper, and they paid for what they thought they got, and everybody walked away from it and seemed happy. It's only after the fact that we find these claims being made for undercharges by the people acting for the trustees of the bankrupt carriers.

Mr. **Mineta**. Let me ask you about that process. Does a collection agency get an assignment of XYZ trucking claim against, let's say, the beer wholesaler and then comes directly against the wholesaler for the undercharge?

Mr. **Sarasin**. I'm not sure I understand all the mechanics of it, but what little I do, it seems that the trustee will either appoint a collection agency, or somebody actually solicits the trustee and says, "I may be able to turn something into cash here."

Mr. **Mineta**. Well, I'm referring to one of the letters that you've put into the record, the one from Mid-Georgia Sales Company. It says,

> Claxton Transport unfortunately went bankrupt in 1985, and a collection agency named Delta Traffic Service bought their old freight bills and compared them to Claxton's posted tariff. Then they sent us an invoice for the difference amounting to some $30,000.

Mr. **Sarasin**. I'm sorry, which one are we referring to?

Mr. **Mineta**. This is the Phil J. Sheridan Mid-Georgia Sales Company.

Mr. **Sarasin**. Okay, I've got it. When they say bought it, I don't know whether that's mechanically how that works. It wouldn't surprise me if that's the way it works, that here's an opportunity or supposedly an opportunity to convert a claim into cash, so it may very well be purchased as old bills or past debts or bad bills would be purchased by factors and so forth.

Mr. **Mineta**. As I understand it, most of your wholesalers are considered small businesses?

Mr. **Sarasin**. We would be considered very small business. The average wholesaler has about a $6 million gross operation, probably 24 employees, maybe six to 10 trucks. That would be the average in our industry. We're sort of ubiquitous, we're everywhere, and there are about 4,000 beer wholesalers in the country. But we are by any analysis, really small business people.

Mr. **Mineta**. Are members of your association very familiar with tariff filing requirements for motor carriers?

Mr. **Sarasin**. Well, as I mentioned in my statement, Mr. Chairman, I don't think they had ever heard the term before these things came up. They were negotiating in good faith, and thought they had a good deal. In just about every letter that's submitted for the record, it was clear there was another carrier perfectly willing to take those shipments at about the same price if not exactly the same price.

Mr. **Mineta**. Well, thank you very, very much, Ron, for your testimony here. I appreciate it very much. Is there anything further you'd like to add for the record?

Mr. **Sarasin**. I've just been handed a note in response to your earlier question. An audit firm will purchase the accounts receivables, and then try to convert them into dollars. They would bring action in the name of the defunct carrier. That, I'm sure, is what's happened in some of these cases.

Mr. **Mineta**. Very well. Thank you very, very much.

Mr. **Sarasin**. Thank you very much.

[Mr. Sarasin's prepared statement appears on page 215.]

Mr. **Mineta**. There being no further business before the subcommittee, we stand adjourned.

[Whereupon, at 5:12 p.m., the subcommittee was adjourned, to reconvene at the call of the chair.]

# PREPARED STATEMENTS OF WITNESSES

BEFORE THE
HOUSE COMMITTEE ON
PUBLIC WORKS & TRANSPORTATION

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SUB-COMMITTEE ON SURFACE TRANSPORTATION

TESTIMONY OF
WILLIAM J. AUGELLO,
EXECUTIVE DIRECTOR/GENERAL COUNSEL
TRANSPORTATION CLAIMS & PREVENTION COUNCIL, INC.
ON
THE IMPACT OF MAISLIN V. PRIMARY STEEL

Dated July 19, 1990

## TESTIMONY OF

## WILLIAM J. AUGELLO, Exec. Dir./General Counsel

## TRANSPORTATION CLAIMS & PREVENTION COUNCIL, INC.

Thank you, Mr. Chairman, for the opportunity to present our views on the need for legislation to overturn the Supreme Court's recent decision in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S.Ct. 884 (1990).

Our Council, formerly the Shippers National Freight Claim Council, Inc., is a not-for-profit trade association dedicated to the prevention of freight loss, damage and delay, the promolgation of reasonable liability rules, laws and claim policies and the equitable resolution of freight claim and freight charge disputes. Its members consist of the transportation professionals in shipper, receiver, carrier, insurer and intermediaries' organizations who are responsible for freight charges and claims, and therefore, have a direct interest in the negotiated, unfiled rate controversy.

### THE IMPACT OF MAISLIN

The Supreme Court's decision on June 21, 1990 rejecting the Interstate Commerce Commission's decision in Ex Parte No. MC-177, 3 I.C.C. 99 (1986) and 5 I.C.C. 623 (1989) has had a devastating effect on the entire motor carrier transportation community. Unless quickly overturned by legislation, shippers, receivers, truck brokers and carriers will be forced to pay additional freight charges which have been estimated to aggregate $200 million in pending law suits and undercharge claims. However, these claims are only "the tip-of-the-iceberg", considering the fact that many motor carriers have discontinued operations or filed for bankruptcy within the past two years and their freight bills are currently being audited.

To date, our Council has identified over 130 carriers which have been filing undercharge claims to collect the difference between the negotiated rates and their tariff rates filed with the I.C.C. A list of such carriers is annexed to this statment as **Appendix A.**

To help shippers and others defend against these undercharge claims, the Council has organized over 50 Joint Defense Groups representing in excess of 1000 shippers, carriers and brokers being sued for over $13 million. These defendants range from the largest conglomerates to the smallest, unsophisticated enterprises. All are victims of the so-called "filed rate doctrine" which charges shippers and receivers with constructive notice of carriers' rates and rules filed in tariffs with the I.C.C. in Washington, DC.

In the less-regulated transportation environment which followed enactment of the Motor Carrier Act of 1980, however, many motor carriers failed to comply strictly with the I.C.C.'s tariff filing regulations. The obvious reason for carriers' failure to file such reductions in rates was to prevent their competitors from meeting their rates for specific shippers. Shippers relied upon carriers' salesmen's quotations of rates and discounts, and their representations that they were duly filed or would be filed before the traffic moved.

Effective Sept. 14, 1981, the I.C.C. closed the public tariff file, thereby forcing public users to share the official tariff file room with the Commission's staff. In 1985, the I.C.C. discontinued scrutinizing tariff filing. The avalanche of new tariff filings by new carriers and existing carriers, which quickly grew from 17,000 to over 36,000, and the thousands of rates and discounts filed daily at the I.C.C., 1/ dictated a more flexible,

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1/ 40,000 tariff pages were reported to have been filed in the week of May 23-27, 1988, for example. MC-C-30117.

practical system of rate negotiation which placed a greater reliance upon carriers' trustworthiness than under the pre-1980 tariff system. Shippers generally abandoned their tariff files due to the impracticality of maintaining such tariffs on a current basis in this rapidly changing environment.

In many cases, carriers placed numerous restrictions on the rates and discounts negotiated with shippers, and secreted these restrictions in rules tariffs without the shippers' knowledge or consent. Typical of such restrictions was the loss of all discounts and special commodity rates if the freight charges were not paid within a stipulated period. While the parties were doing business, the carriers failed to complain if charges were not received within the stipulated credit period. Only after a carrier discontinued doing business were these credit rules brought to light by collection agencies under contract to trustees.

Some agencies purchased carriers' freight bills, knowing of the widespread disregard for strict observance of tariff regulations and hidden rules. A "cottage industry" of opportunistic collection agencies quickly grew to take advantage of this situation, some of which were formed by former employees of the defunct carrier having inside knowlege of the carrier's violations of tariff-filing regulations.

Examples of the course of conduct prevailing throughout the post-1980 period in which competition between motor carriers and freight forwarders flourished, *as intended by Congress*, were provided to the Supreme Court in SNFCC's *amicus curiae* brief filed on June 30, 1989 in *Supreme Beef Processors v. Robert Yaquinto, Jr. Trustee for Caravan Refrigerated Cargo, Inc.*, No. 88-1958. Annexed as **Appendix** B is a copy of the Digest of Unreasonable Practices reported to the Supreme Court as Appendix A to that brief. They include examples of the deliberate frauds committed on shippers through the use of counterfeit tariffs; the establishment of audit agencies by former carrier officials who promulgated the tariff restrictions which resulted in the technical undercharges; the conscious decisions by carriers' upper management to refrain from publishing the negotiated rates; claiming that transportation was performed by a company under its common carrier certificate rather than its contract permit or broker's license; publishing credit rules without the shipper's knowledge which invalidated discounts and subjected the shipper to interest and attorney fees for collections, etc.

The following additional examples of the circumstances under which undercharges are being sought illustrate the glaring inequities resulting from a strict application of the filed rate doctrine in the post-1980 period:

1) Where a carrier's tariff placed a 45,000 lb. maximum weight on a quoted rate without the shipper's knowlege, and shipments exceeded the maximum by a few pounds, the collection agencies are contending that the tariff rate does not apply, and instead, the carrier's *class* rates must be charged. Thus, the carrier's failure to provide for an excess weight rule results in an increase in the quoted published charge of $550 per truckload to $1,862, a 238% increase. (See Appendix C).

2) An office furniture manufacturer submitted bids to provide furniture to every Post Office in the U.S. and certain Air Force facilities at a delivered price based on a written rate quotation received from a carrier. The contract was awarded and performed, but the manufacturer is being sued for an additional $50,000 in freight charges based on higher filed rates due to the fact that the carrier *interlined* this traffic with other carriers for its own convenience. The carrier, McLean Trucking Co., apparently published the agreed rates to apply only when the traffic was handled on a single-line basis.

The Supreme Court ignored similar evidence of violations of the law, in *Maislin*, opting to adhere to its 80 year-old doctrine intended to prohibit discrimination among shippers.

## THE I.C.C. POLICY STATEMENT

Faced with voluminous evidence of industry-wide tariff violations, misrepresentations, and in some cases fraudulent practices by motor carriers and freight forwarders following enactment of the Motor Carrier Act of 1980, the I.C.C. concluded that its previously strict interpretation of the filed rate doctrine should be relaxed in the public interest. The Commission concluded that in the more competitive transportation environment mandated by Congress, the marketplace was a sufficient deterrent to discrimination and that it had discretionary powers under 49 U.S.C. §10701(a) to grant relief to the victims of these unlawful practices.

Acting in response to shipper organizations' petitions, the I.C.C. declared that it would constitute an unreasonable practice to collect more than the negotiated rate under certain conditions. This new policy was upheld by 20 Circuit Court Judges in 13 independent cases in six circuits. (See **Appendix D**). Only the Fifth Circuit ruled differently. In addition, over 100 U.S. District Courts and Bankruptcy Courts upheld the I.C.C.'s primary jurisdiction to adjudicate this issue.

Nevertheless, the Supreme Court reversed the Eighth Circuit's decision in Maislin on the ground that the I.C.C. lacked authority to find that it would be an unreasonable practice to do what the statute required. The Court concluded that the Commission may find the filed rate to be unreasonable, and remanded the case to the Eighth Circuit for exploration of this issue. (Footnote 10, Maislin).

## LEGISLATIVE RELIEF NEEDED

No public purpose is being served by the Supreme Court's decision in Maislin. Payment of judgements against shippers, brokers and carriers to defunct carriers' trustees will not benefit the motor carrier industry. Nor will payment produce any significant benefit to creditors as the collection agencies, auditors and their attorneys retain approximately 80% of the amounts recovered as commissions, fees and expenses. See, for instance *In re: Rose Freight Lines, Inc.*, Bkcy. 4-87-2990, Aug. 10, 1989, U.S. Bkcy. Ct., D.Minn., wherein the court *refused* to approve an audit contract under which the creditors would receive only 20% of the recoveries, and expressing the opinion that this practice does not reflect well on the bankruptcy system.

If Congress fails to intervene in this controversy before it adjourns, much of the benefits resulting from the 1980 Motor Carrier Act will be dissipated. Congress must not permit the Supreme Court's myoptic view of the Motor Carrier Act of 1980 to prevail.

The Supreme Court clearly laid the solution to this unanticipated problem in Congress' hands, stating

> "If strict adherence to §§10761 and 10762 as embodied in the filed rate doctrine has become an anachronism in the wake of the Motor Carrier Act, it is the responsibility of Congress to modify or eliminate these sections." Pg.18, *Maislin*.

Justice Scalia, in a concurring opinion, added

> "Perhaps deregulation cannot efficiently be accomplished within that framework, but that is Congress' choice and not the Commission's or ours."

In our Council's opinion, the Supreme Court improperly considered the filed rate doctrine in light of the statutory scheme designed to regulate the railroads in the 1890's and motor carriers and freight forwarders in the pre-1980 era. The Court misread Congress' intent in 1980 to leave to its designated body of experts discretionary powers to make any adjustments in its regulations and enforcement policies necessary to give effect to the *new* regulatory scheme for motor carriers and freight forwarders in the 1980's. Congress need not have changed §§10761 or 10762 in 1980, as repeatedly stated by the Court. Nor was it necessary to amend or repeal §10741 which prohibits discrimination. We sincerely believe that Congress left to the I.C.C. the details of how to harmonize these statutes with the newly mandated competitive environment. Congress left the Commission's "reasonableness powers" under §10701(a) in tact in 1980, and the I.C.C. dutifully relied upon these powers to find that the course of conduct which flowed from the statutory and regulatory changes made in the 1980's constituted an unreasonable practice which rendered the filed rates unlawful.

Congress must now overturn the Supreme Court's decision and reaffirm its intent to delegate these powers to the I.C.C. In so doing, the following issues must be addressed in the legislation if it is to survive judicial review and provide shippers with effective relief:

1. The remedial legislation must be made applicable to all pending and future claims and suits, and must be enacted before adjournment of this session of Congress. The need for an immediate remedy cannot be overemphasized. Primary Steel's plight is illustrative of the plight of thousands of other defendants in similar pending cases. Motions for summary judgments are pending and will be granted in many cases forthwith. In Primary Steel's case, for example, it may be forced to pay $187,923.36 plus prejudgment interest from 1983 totalling approximately $100,000, or a total of $288,000 to Maislin's trustee very shortly unless Congress comes to its aid.

2. The remedial legislation must specifically provide that when additional freight charges are alleged to be due, a shipper/defendant need not pay the claimed tariff rate and then seek relief through a petition to the I.C.C., as held by the Fifth Circuit in Caravan v. Supreme Beef Processors, Inc., 864 F.2d 388, 391-392 (5th Cir.1989), cert.den. 110 S.Ct. ___ (1990), citing its decision in Southern Pacific Transp. v. City of San Antonio, 748 F.2d 266 (1984). This provision is essential to protect shippers against being

forced to pay claimed undercharges sought by the carriers' trustees pending the I.C.C.'s determination of their lawfulness. Plaintiffs' counsel are currently making such demands in pending law suits. If shippers are required to make such payments to Trustees, they will be devoured by collection agencies', Trustees' and attorneys' commissions, fees and expenses and thus will be unavailable to make reparations to shippers even if the I.C.C. rules that the filed rates were unreasonable or otherwise unlawful.

A simple statement adding the following provision at the end of Section (1) of HR 3243 could remedy this problem. For instance,

> "In such proceedings, the payment of the filed tariff charges shall not be required pending referral to the I.C.C."

3. The Commission's authority to find a filed tariff rate to be unlawful by reason of a carrier's unreasonable practices must be affirmed. In this connection, Congress must reaffirm its intention that §§§10741, 10761 and 10762 be implemented by the I.C.C. in harmony with §10701(a), and that no statute be elevated above another.

4. Congress' intent in 1980 to rely on increased competition among motor carriers and freight forwarders as a regulator of discrimination, in lieu of a strict interpretation of the filed rate doctrine, must be reaffirmed. The elimination of the prohibition against dual operations as a common and contract carrier, thus removing the "per se discriminatory" label from dual operations, is clear evidence of such intent. See Pub.L.96-296 §10(b)(1) amending 49 U.S.C. §10930(a)(1). See Also §10923(d)(1) and (2) permitting grants of industry-wide permits to broad geographic areas and to serve broad classes of persons, such as "all shippers and brokers of general commodities". Unless this intent is reaffirmed by Congress, many other Commission policy changes made after 1980 will be subjected to judicial review as a result of the Supreme Court's decision. See Footnote 14 in Maislin, for instance.

The following amendment would appear to accomplish this result:

> "Amend 49 U.S.C. 10701 by adding another subsection, as follows:
>
> Notwithstanding any other provision of this subtitle, in considering the reasonableness of motor carrier and freight forwarder rates, classification, rules and practices on property moved pursuant to the Motor Carrier Act of 1980, the Commission has discretion to harmonize the provisions of this section with sections 10741, 10761 and 10762, and to consider changes in competition and other conditioins in the transportation industry resulting from changes enacted by the Motor Carrier Act of 1980, P.L. 96-295, July 1, 1980."

## IMPACT ON THE FEDERAL BUDGET DEFICIT

Shippers and consumers will not be the only losers under Maislin if remedial legislation is not enacted quickly. Thousands of cases will need to be referred to the I.C.C. to determine the reasonableness of the filed tariff rates claimed to apply in pending and future undercharge cases.

At the present time, the I.C.C.'s staff consists of only three Administrative Law Judges who each handle approximately 50 cases a year. The additional appropriations needed to accommodate approximately three to five thousand rate reasonableness cases would be staggering. At a time when the Congress is struggling with the national deficit, Congress needs to adopt measures which will avoid such unnecessary spending of taxpayers' money. Enactment of remedial legislation to overturn Maislin will thus be in the public interest.

## MAISLIN'S IMPACT ON CONTRACTS

The Supreme Court's decision, when combined with recent I.C.C. decisions invalidating contracts between shippers and brokers, on the one hand, and contract carriers on the other, has potential for causing significantly greater financial injury to the shipping community. In the course of considering negotiated rate cases, the I.C.C. has declared that contracts which fail to strictly comply with its regulations are invalid, and therefore, the carriers provided service under their common carrier certificate rather than their contract ~~permits.~~ The Commission granted relief from these carriers' filed common carrier rates, however, by considering the negotiated contract rate to be the lawfully applicable rate pursuant to its negotiated rate policy. The Supreme Court's reversal of that policy therefore places thousands of shippers in jeopardy of having their contracts set aside, thus requiring payment of carriers' common carrier tariff rates. These claims could readily cost shippers billions of dollars.

The Council has recently filed a petition with the I.C.C. requesting immediate repeal of its contract carrier regulations and a reversal of decisions which invalidated contracts for failure to adhere to statutory and regulatory criteria. If Congress fails to overturn Maislin, and the I.C.C. fails to rectify its policy on contracts, the consequences will be far more serious than the amounts sought in pending cases due to the prevalence of contracting to avoid the filed rate doctrine.

### HR 3243

This Council will support any legislative approach which will directly overturn Maislin in a manner which will protect shippers from payment of all pending and future claims based on carriers' negligent or intentional failure to properly publish and file the agreed rates and discounts.

The Council cannot, however, support any attempt to deprive shippers and receivers of any other statutory rights such as a reduction in the statute of limitations for filing overcharge claims, as a quid pro quo for enactment of legislation which merely reaffirms past Congressional intent.

The Committee's early mark-up of appropriate legislation is respectfully requested.

APPENDIX A

120 MAIN STREET (BOX Z)
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TRANSPORTATION
CLAIMS AND PREVENTION COUNCIL, INC.
WILLIAM J. AUGELLO, Executive Director General Counsel

LIST OF 131 CARRIERS HAVING FILED
UNDERCHARGE CLAIMS AGAINST SHIPPERS
BASED ON NEGOTIATED BUT UNFILED RATES

*A & B TRANSPORTATION
ADAMS EXPRESS
*ADVANCE UNITED EXPRESSWAYS, INC.
ALLSTATE
AMERICAN CARRIERS, INC.
*AMERICAN FREIGHT SYSTEMS, INC.
ANDERSON MOTOR LINES
*ATLANTIS EXPRESS
B. B. & B. TRANSPORTATION
B.D.L. TRUCKING
B. F. WALKER
BRANCH MOTOR EXPRESS COMPANY
BREMAN'S EXPRESS COMPANY
BRIGGS TRANSPORTATION COMPANY
*BRINKE TRANSPORTATION CORPORATION
BRITTON MOTOR SERVICE, INC.
*BULLET EXPRESS
*C & H NATIONWIDE
CALIFORNIA MOTOR EXPRESS
*CAMPBELL SIXTY-SIX EXPRESS, INC.
*CANNY TRUCKING COMPANY, INC.
CARAVAN REFRIGERATED CARGO
CARLEPIED TRANSFER
CAROLINA MOTOR EXPRESS, INC.
CATAWABA VALLEY MOTOR LINES
*CERTIFIED CARRIERS OF AMERICA
CHIEF FREIGHT LINES
CLAIRMONT TRANSFER COMPANY
CLAXTON TRANSPORT
*COLISEUM CARTAGE COMPANY, INC.
*COLUMBIA NAVIGATION
*CROSS E TRANSPORTATION
CW TRUCKING TRANSPORTATION
DEPENDABLE CARTAGE AND TRANSPORTATION CO.
DUDLEY TRUCKING COMPANY
DUNKLEY TRANSPORTATION
DUNKLEY TRANSPORTATION
EAGLE EXPRESS COMPANY
EAZOR SPECIAL SERVICES, INC.
EMPORIUM TRUCK LINES
*EXPRESS FREIGHT LINES
*EXPRESS TRANSPORTATION COMPANY
FELDSPAR TRUCKING COMPANY
*FOY TRUCKING
*FREIGHTCOR SERVICES, INC.
G.M.W., INC.
GATEWAY TRANSPORTATION COMPANY, INC.
GLENDENNING MOTORWAYS, INC.
GORDON TRANSPORTS, INC.
GREENSTREAK SERVICES
HAGEN, INC.
*HALLS MOTOR FREIGHT TRANSIT COMPANY
HALLS SYSTEM, INC.
*R.L. HARRISON TRUCKING COMPANY
HIGHWAY EXPRESS, INC.
H.M.X.
*HORN'S MOTOR EXPRESS
I.C.X.
I.M.L. FREIGHT, INC.
INTERSTATE MOTOR FREIGHT SYSTEM
INDIANHEAD TRUCK LINES
INF, LTD.
INMAN FREIGHT SYSTEMS
INTERNATIONAL DISTRIBUTION CENTERS, INC.
*LEE WAY MOTOR FREIGHT, INC.
*MAISLIN INDUSTRIES, U.S., INC.
*MANLEY TRUCK LINES, INC.
*McLEAN TRUCKING COMPANY
MERCHANT STOR-DOR FREIGHT SYSTEMS, INC.
MERCURY FREIGHT LINES, INC.
MID AMERICAN LINES, INC.
*MILNE TRUCK LINES, INC.
MISTLETOE EXPRESS SERVICES
MOTOR FREIGHT EXPRESS, INC.
*MURPHY MOTOR FREIGHT LINES, INC.
NEW ULM FREIGHT LINES
*NOERR MOTOR FREIGHT, INC.
OBSERVER TRANSPORTATION COMPANY, INC.
*ONEIDA MOTOR FREIGHT, INC.
ONE-WAY CARTAGE SYSTEM
ORSCHELN BROTHERS TRUCK LINES
*OVERLAND EXPRESS, INC.
PENNCO TRUCKING
PERRY MOTOR FREIGHT, INC.
PILOT FREIGHT CARRIERS
PRE-FAB TRANSIT COMPANY
*QUINN FREIGHT LINES
*REBEL MOTOR FREIGHT, INC.
REGAL TRUCKING COMPANY
RFI TRANSPORT, INC.
*RITTER TRANSPORTATION, INC.
ROBBINS TRUCK LINE, INC.
ROBINSON TRUCK LINES, INC.
ROSE FREIGHT LINE
*ROSE WAY, INC.
RTC TRANSPORTATION, INC.
SAM TANKERSLEY TRUCKING
*SANTA FE TRAIL TRANSPORTATION COMPANY

SAVAGE BROTHERS
*SHARM EXPRESS, INC.
SHIPWESTERN EXPRESS
SILVER WHEEL FREIGHT LINE, INC.
*SMITH TRANSER
SW FREIGHT LINES
*SOUTHWEST MOTOR FREIGHT
*SPECTOR RED BALL
*SQUAW TRANSIT COMPANY
STERLING TRANSPORT
*STEVE D. THOMPSON TRUCKING
*SUBURBAN MOTOR FREIGHT,INC.
SUTCO TRANSPORTATION
*SYSTEM 99
TAYNTON FREIGHT SYSTEMS, INC.
TITAN TRANSPORTATION, INC.
*TOBLER TRANSFER, INC.
TOTAL TRANSPORTATION TRUCKING, INC.
TRANSPO INTERNATIONAL, INC.
*TRANSPORTATION SYSTEM INTERNATIONAL, INC.
TUCKER FREIGHT LINES
*TWIN CITY FREIGHT, INC.
*TWIN CONTINENTAL
*UNITED SHIPPING COMPANY
*UNZICKER TRUCKING
*USA EASTERN, INC.
*USA WESTERN, INC.
*WENHAM TRANSPORTATION, INC.
*WESCAR FREIGHT SYSTEMS, INC.
WEST COAST TRUCK LINES, INC.
WESTERN HARVEST CARRIERS
WILSON FREIGHT
L.C. WORLEY TRANSFER, INC.
YOUNGER TRANSPORTATION

* TCPC JOINT DEFENSE GROUP

## APPENDIX B

1.

### DIGEST OF UNREASONABLE CARRIER AND FORWARDER PRACTICES RESULTING FROM THE PRO-COMPETITIVE ENVIRONMENT CREATED BY THE MOTOR CARRIER ACT OF 1980

1. A motor carrier's President negotiated rates with a major dress manufacturer, using a schedule of rates purported to be the filed tariff rates. After years of doing business at these rates, the parties experienced a conflict, and the shipper decided to discontinue doing business with this carrier. The carrier's president then threatened to institute a suit against the shipper for the difference between the billed rates and the actual tariff rates which were on file with the Commission without the shipper's knowledge, a sum which exceeded $1 million. (*Lady Carol Dresses v. The International Distribution Centers, Inc.*, MC-C-10867 (ICC)).

2. The carrier's Vice-President of Pricing established rate and discount policies for its salesmen but then published numerous restrictions and limitations in its tariff without the knowledge or consent of the salesmen or the shipper/customer. One such restriction limited the discount to points served *directly* by the carrier. Although the carrier held operating authority from the ICC to serve all points in the United States and advertised "Direct Single Carrier Service, Nationwide," the carrier then unilaterally routed portions of shippers' traffic via connecting carriers for its own operating convenience, thus voiding the discounts under a strict application of the tariff.

Before the carrier filed for bankruptcy, the Vice-President of Pricing and Assistant Controller left the carrier's employ and formed an auditing firm which obtained a contract from the Trustee to audit the bankrupt carrier's freight bills. This auditing firm has admitted collecting $8.5 million thus far in undercharges which the Vice-President of Pricing helped to create during the course of his employment by the carrier. (*McLean Trucking Company and Pacesetter/Coliseum Cartage Company, Inc.*, Bankr. W.D.N.C.)

3. A carrier's President was asked why the negotiated rate was not being filed in the carrier's tariff to which he responded, "I don't know." The President then failed to bring the carrier's rate practices into compliance with the law, thus indicating management's consent to, and approval of this practice. (*Oneida Motor Freight v. Appco*, E.D.N.Y.)

4. A forwarder's President issued instructions to its sales force and tariff department to negotiate rates but not publish them unless a shipper insisted upon receiving a published tariff before tendering traffic, thus preventing its competitors from meeting their discounts. (*Wescar Freight Systems*, California and Oregon Federal and State Courts).

5. A carrier agreed to publish a negotiated rate in terms of dollars per truck load. However, when published and filed with the ICC, the carrier unilaterally added a 46,000 pound maximum in the tariff without informing the shipper. After a long period of billing at this rate, the carrier voluntarily discontinued business and began to issue undercharge claims for the excess weight shipped and accepted by the carrier without complaint. (*Rebel v. Muehlenstein*, W.D. Tenn.)

6. A forwarder agreed to publish a rate to Kings Mountain, N.C. and the shipper tendered traffic and paid the agreed rate to this point over a long period of time. After the carrier discontinued its business, it sold its freight bills to a collection agency which discovered that the forwarder erroneously published the rate to "Kings Mountain, TN." a *non-existent* point. The auditor filed undercharge claims totalling $128,763 based on the for-

warder's class rates. (*Wescar Freight Systems v. Freightliner*, D.C. Or.)

7. A forwarder's salesman was furnished a counterfeit copy of a tariff page alleging that it represented the rates filed on a specific date for the shipper. Traffic was tendered to the forwarder in reliance upon that representation, but the forwarder later sued for a higher rate when its collection agency discovered that the tariff page shown to the shipper was not filed until months later and in a different print. (*Wescar Freight Systems, Inc.*)

8. A motor carrier quoted flat rates over the telephone in order to obtain revenue to cover operating expenses for the back haul of its equipment to its home base. The rate quotation was verified by typing on the freight bill the name of the company official authorizing the rate. However, the rate quotation was never published in the carrier's tariff or filed with the ICC. (*Maislin*, E.D. Mich.).

9. A frieght salesman solicited a shipper's traffic, contending that the company holds contract carrier authority and a broker's license from the ICC. The parties agreed to a rate which the shipper believed was quoted by the salesman in his capacity as a broker possessing a contract with its contract carrier affiliate, thus avoiding the necessity for filing the rate. After bankruptcy, the collection agency billed the shipper for that company's *common* carrier tariff rates. (*Sharm Express, Inc.*, Bankr. Ct. Minn.).

10. A carrier indicated in its tariff that it participated in the National Motor Freight Classification, which is an essential tariff establishing a classification rating for each commodity shipped. However, the carrier failed to become a party to the classification thus rendering all of its class rates defective. The auditors ignored this defect and sued the carrier's former customers for the full class rates, contending that participation in the classifi-

cation is not necessary. (*Transportation Systems International, Inc.*, Bankr. Ct., Minn.)

11. A carrier required designated officers to approve all discount agreements, informing its salesmen that the rates were lawfully filed when the "Discount Request Form" was initialled by designated officers. The salesmen was not informed that the customer must request the discount in writing or that the discounts were conditioned on the volume of traffic tendered to the carrier each month.

After bankruptcy, one of the officials whose signature was required to approve discounts became an owner of the collection agency seeking the recovery of additional freight charges from the shippers for whom he approved the discounts on the grounds that no letter of participation was on file for those shippers, and/or that volume minimums were not met. The attorney representing the collection agency was the son of the former owner of the carrier and brother of one of its managing officers who was authorized to approve discounts. (*Transportation Systems International, Inc.*, Bankr. Ct. Minn.)

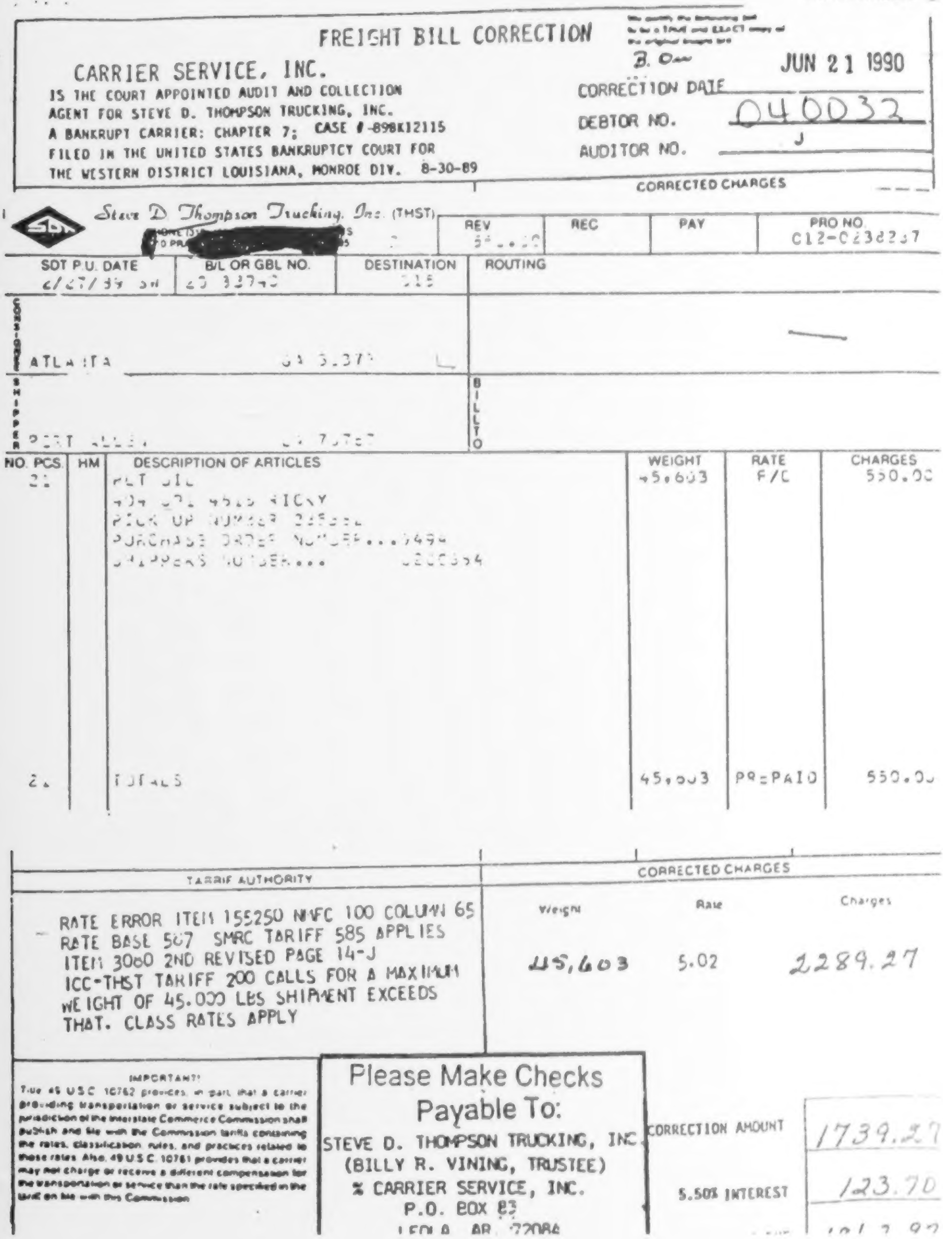
12. A carrier negotiated discounts with its shippers, but when published, its tariffs incorporated by reference a rule which conditions the discount upon the payment of freight charges within the carrier's credit rules. The latter rules were not brought to the shippers' or carrier salesmen's attention until after the carrier files for bankruptcy, at which time undercharge claims for the full amount of the discount were filed. (*Campbell 66*, D.N.J.)

13. Atrustee sold a bankrupt carrier's freight bills to a collection agency for auditing and filing undercharge claims. The collection agency then sued shippers in the Bankruptcy Court to gain an additional two years within which to recover claims, as provided by the Bankruptcy Act. When the Bankruptcy Judge dismissed these suits for lack of jurisdiction, the collection agency then attempted to regain the jurisdiction of the Bankruptcy

Court by agreeing to return 5 percent of the amounts collected to the Trustee, a scheme which the Bankruptcy Court later rejected. (*Coliseum Cartage Company, Inc.*, D.N.C.)

14. A carrier quoted rates to a broker by telephone, but never furnished a copy of its filed tariff although requested to do so by the broker. After bankruptcy, the collection agency billed the broker for late payment of freight charges published in the carrier's tariff which were never disclosed to the broker, consisting of 1.25 percent per month and attorney fees of 33 percent of the transportation and late payment charges. (*Coliseum Cartage*, D.N.C.)

## APPENDIX C



FREIGHT BILL CORRECTION

CARRIER SERVICE, INC.
IS THE COURT APPOINTED AUDIT AND COLLECTION
AGENT FOR STEVE D. THOMPSON TRUCKING, INC.
A BANKRUPT CARRIER: CHAPTER 7; CASE #-898K12115
FILED IN THE UNITED STATES BANKRUPTCY COURT FOR
THE WESTERN DISTRICT LOUISIANA, MONROE DIV. 8-30-89

B. O.
CORRECTION DATE JUN 21 1990
DEBTOR NO. 040032
AUDITOR NO. J

CORRECTED CHARGES

Steve D. Thompson Trucking, Inc. (THST)
[redacted]

| REV | REC | PAY | PRO NO. |
|---|---|---|---|
| [illegible] | | | C12-0238237 |

| SOT P.U. DATE | B/L OR GBL NO. | DESTINATION | ROUTING |
|---|---|---|---|
| 6/27/89 SH | 20 33740 | 215 | |

CONSIGNEE: ATLANTA GA 30377

SHIPPER: PORT ALLEN LA 70767

BILL TO

| NO. PCS. | HM | DESCRIPTION OF ARTICLES | WEIGHT | RATE | CHARGES |
|---|---|---|---|---|---|
| 21 | | PET OIL<br>404 071 4515 RICKY<br>PICK UP NUMBER [illegible]<br>PURCHASE ORDER NUMBER...5494<br>SHIPPERS NUMBER... [illegible] | 45,603 | F/C | 550.00 |
| 21 | | TOTALS | 45,603 | PREPAID | 550.00 |

| TARRIF AUTHORITY | CORRECTED CHARGES | | |
|---|---|---|---|
| | Weight | Rate | Charges |
| RATE ERROR ITEM 155250 NMFC 100 COLUMN 65 RATE BASE 507 SMRC TARIFF 585 APPLIES ITEM 3060 2ND REVISED PAGE 14-J ICC-THST TARIFF 200 CALLS FOR A MAXIMUM WEIGHT OF 45.000 LBS SHIPMENT EXCEEDS THAT. CLASS RATES APPLY | 45,603 | 5.02 | 2289.27 |

IMPORTANT!
Title 49 U.S.C. 10762 provides, in part, that a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission shall publish and file with the Commission tariffs containing the rates, classification, rules, and practices related to those rates. Also, 49 U.S.C. 10761 provides that a carrier may not charge or receive a different compensation for the transportation or service than the rate specified in the tariff on file with this Commission.

Please Make Checks
Payable To:
STEVE D. THOMPSON TRUCKING, INC.
(BILLY R. VINING, TRUSTEE)
% CARRIER SERVICE, INC.
P.O. BOX 83
LEOLA, AR. 72084

CORRECTION AMOUNT 1739.27
5.50% INTEREST 123.70

## APPENDIX D

### LIST OF CIRCUIT COURT CASES UPHOLDING THE ICC'S NEGOTIATED RATE POLICY

| Case | Court | Judges |
|---|---|---|
| Delta Traffic Services, Inc., et. al. vs. Transtop, Inc., U.S. Crt. Appeals, No. 89-1662,(4/13/90) (1990 WL 47221) | 1st Circuit | Bownes, Breyer & Selya |
| Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. vs. Appco Paper & Plastics Corp., 893 F.2d 472 (1990) | 2nd Circuit | Miner & Altimari<br>Gray - Dist. Crt. |
| Carriers Traffic Service, Inc. vs. Anderson, Clayton & Co., (embracing Inman Freight Systems vs. Boise Cascade Corp. and Orscheln Bros. Truck Lines vs. Cooper Industries), 881 F.2d 475, (1989). | 7th Circuit | Wood, Jr., Cudahy & Kanne |
| Orscheln Bros. Truck Lines, Inc. Barry S. Schermer, Trustee and Assigner and Carrier Traffic Service, Inc. vs. Zenith Electric Corp., U.S. Crt. Appeals, Nos. 89-1261, 89-1329, 89-1330, (4/10/90) [1990 WL 41099] | 7th Circuit | Posner, Ripple & Kanne |
| Maislin Industries and U.S., Inc. vs. Primary Steel, Inc., 879 F.2d 400, cert. granted 110 S.Ct. 834, 1/16/90, No. 89-624; and INF vs. Spectro Alloys, 881 F.2d 546 (1989) | 8th Circuit | John R. Gibson, Wollman & Bright |
| West Coast Truck Lines, Inc. vs. Weyerhaeuser, (embracing WCTL vs. Marine Lumber and WCTL vs. Weyerhaeuser) 893 F.2d 1016 (1990); and West Coast Truck Lines, Inc. vs. American Industries, Inc. d/b/a American Steel, 893 F.2d 229 (1990) | 9th Circuit | Wallace, Pregerson & Alarcon |
| Seaboard System R.R., Inc. vs. U.S. 794 F.2d 635 (1986) | 11th Circuit | Roney, Fay & Simpson |

*Before the*

# UNITED STATES HOUSE OF REPRESENTATIVES SURFACE TRANSPORTATION SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

JULY 19, 1990
WASHINGTON, DC

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*Statement of the*

## AMERICAN TRUCKING ASSOCIATIONS, INC.

*On*

## FILED RATE DOCTRINE AND NEGOTIATED RATES CASES

---

**Lana R. Batts**
Senior Vice President, Government Affairs

Without Trucks
America Stops

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
SURFACE TRANSPORTATION SUBCOMMITTEE
OF THE COMMITTEE ON
PUBLIC WORKS AND TRANSPORTATION

---

# STATEMENT OF THE
# AMERICAN TRUCKING ASSOCIATIONS, INC.
# ON THE
# FILED RATE DOCTRINE
# AND
# NEGOTIATED RATES CASES

---

Mr. Chairman, and members of this Subcommittee, my name is Lana Batts, and I am Senior Vice President, Government Affairs of the American Trucking Associations, Inc. (ATA). ATA is the national trade association of the trucking industry. ATA's membership includes more than 4,000 carriers and industry suppliers of all sizes and types. In addition, membership in our 51 state associations and 10 conferences totals over 30,000 trucking companies. Many of these member trucking companies are regulated by the Interstate Commerce Commission and must comply with the tariff filing and rate regulations provision of the Interstate Commerce Act. ATA, therefore, has a significant interest in the tariff filing requirements of the Interstate Commerce Act and has an appreciation for the problem of negotiated, but unfiled rates. I am grateful for the opportunity to present ATA's views on this subject and to state this association's, and its members, support for a legislative solution to this problem.

My remarks, today, will address several issues:

- The cause of the problem; and
- The need for legislation that addresses the problem.

I believe it is important to understand that the unfiled rate problem is the result of ten years of neglect by past ICC administrators that permitted carriers and shippers to ignore the tariff filing requirements of the statute. Even after the problems was brought to the agency's attention in the mid-1980's through the shippers' requests for relief, the ICC's "solution" to the problem was to find that the collection of the lawfully filed rate was an unreasonable practice, rather than take the more effective approach of enforcing the tariff filing provisions of the statute.

By striking down the ICC's policy, the Supreme Court has now eliminated any doubt as to the validity of the tariff filing requirements under existing law and neither carriers nor shippers should have any doubt at this time as to the need for or the importance of the tariff filing rules.

The Court's decision has put everyone on notice of the continued necessity of filed rates. We believe, as does the

Court, that the Filed Rate Doctrine continues to be valid. The purposes of the Filed Rate Doctrine are to:

- Prevent rate discrimination;
- Promote competition;
- Ensure that rates are reasonable; and
- Provide public notice of common carrier rates and rules.

ICC enforcement of the tariff filing requirements will ensure that these goals are accomplished and will also ensure that the current situation does not re-occur.

In addition to understanding the causes of the problem, there is a need for a legislative solution to the problem. ATA, RCCC, and the various shippers' interest have recognized this and have been working towards a solution for more than a year. The Supreme Court's recent decision in Maislin should remove all doubts as to the need for Congressional action.

The ICC's failure to enforce the tariff filing rules has resulted in hundreds of shippers being trapped in situations for which there is no exit without the proposed legislation.

The legislation solution which we support is similar to H.R. 3243, with certain revisions, either made necessary by the Maislin decision or agreed upon by shipper and carrier interests so as to make the solution more responsive to the problem.

These provisions include:

1. Granting of limited authority to the ICC to determine the reasonableness of requiring a shipper to pay under charges;
2. Reducing the statute of limitations on over and under charges from 3 years to 18 months. The reduction of the statute of limitations will reduce shippers' exposure to negotiated rate claims in the future. It will also reduce administrative costs for carriers and shippers

associated with the processing and verification of stale claims.

3. Provide a mechanism by which carriers and shippers can jointly correct, with ICC approval, inadvertent tariff errors with out exposure to civil and criminal penalties under the Elkins Act. Tariff errors do occur and a mechanism is necessary to correct them. The ICC currently has a procedure to waive under charges for railroads. Motor carriers need similar relief.

This legislation, which is supported by the major trucking and shipper associations, will be a significant factor in resolving the unfiled, negotiable rates problem, but prevention of its reoccurrence is another major step in resolving the problem and only effective enforcement of the tariff filing requirements by the ICC will accomplish that portion of the solution.

STATEMENT OF EARL W. BECK

ON BEHALF OF

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

BEFORE

SUBCOMMITTEE ON SURFACE TRANSPORTATION

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

UNITED STATES HOUSE OF REPRESENTATIVES

ON

MOTOR CARRIER NEGOTIATED RATES

JULY 19, 1990

Good Morning Chairman Mineta and Members of the Subcommittee:

I am Earl W. Beck, Director-Transportation-Worldwide, Eaton Corporation, Cleveland, Ohio. I appear today on behalf of the National Industrial Transportation League. I am the current Chairman of the League's Legislative Committee. Accompanying me as counsel is Richard D. Fortin of Donelan, Cleary, Wood & Maser, P.C.

The National Industrial Transportation League is a voluntary association of shippers, shipper associations, boards of trade, chambers of commerce, and other entities concerned with the purchasing of freight transportation services. The members of the League utilize all of the various modes of transportation and are substantial users of transportation by motor common carrier. The League is the only nationwide organization representing shippers of all sizes and commodities using all modes of transportation to move their goods in intrastate, interstate and international commerce. Directly or indirectly, its members are responsible for the routing of about 80 percent of the nation's commercial freight.

The League played an active role in the process which led to the enactment of the Motor Carrier Act of 1980. In this legislation, Congress substantially reformed motor carrier regulation by fostering a more competitive trucking industry, including placing a new emphasis on market oriented services and prices.

We are here today to seek the subcommittee's support and leadership in resolving a major threat to this environment -- a threat that needlessly could add hundreds of millions of dollars to the national freight bill without producing any benefit for our national transportation system. Specifically, the recent Supreme Court decision in *Maislin v. Primary Steel* requires that Congress this session reaffirm its support for a market disciplined and vital trucking industry. Congress needs to make clear that when it enacted the 1980 Motor Carrier Act, it intended for the old regulatory scheme to give way to a more competitive and innovative one.

The Motor Carrier Act has worked very well over the past decade. Shippers and carriers have helped, through the spirit of cooperation and efficiency it has fostered, to keep American businesses competitive both domestically and abroad. The Department of Transportation estimates that the Motor Carrier Act and the Staggers Rail Act have improved U.S. productivity by about $38 billion a year -- a total benefit of almost $400 billion.

In contrast to the pre-1980 era of uniform rates and service levels, today's shipper and carrier executives constantly are reacting to new market opportunities with innovative rates and services that are responsive to their respective individual needs.

It is in this context of a dynamically competitive trucking industry that the "negotiated rate" problem has arisen. As a result of the 1980 Act, there has been and continues to be a dramatic increase in the number and diversity of rates made available to shippers through negotiations with both existing and new carriers.

Most rates prior to 1980 were uniform, and typically were published in regional rate bureau tariffs. Today, most carriers have an enormous number of rates with varying levels of service that are published in individual carrier tariffs. There has been, in short, a substantial shift from a uniform, tightly regulated motor carrier pricing structure to a regime that allows a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public.

These competitive reforms, while providing new opportunities, also have led to a number of carriers exiting the market. When this occurs, the carrier's freight bills typically are audited by third party collection agencies for the purpose of finding discrepancies between the rates billed and collected and the carrier's tariff rates.

Under the Interstate Commerce Act, it is the carrier's duty to file every rate which it uses to transport goods. Consequently, a carrier's failure to file a tariff or to not fully inform a shipper about any technical obligations attached to the rate leaves the shipper open to after-the-fact claims by these collection agents. While this is not fair, it technically is the law.

In other words, what these audits often have found is that the agreed-upon rate repeatedly assessed by the carrier and fully and timely paid by the shipper was in some cases not filed in a tariff and, therefore, was technically not the applicable published tariff rate. Where this occurs, the collection agency then presents the shipper with "balance due" bills.

Shippers objected to these balance due billings on the grounds that the amounts originally assessed and paid were the terms upon which the shipper and carrier had agreed to conduct, and in fact did conduct, mutually beneficial business. The negotiated rates were considered market rates, not secret "off-tariff" rates. The rates typically could be obtained from a number of competing carriers. Shippers believed these agreed-to rates would be published in duly filed and effective tariffs by the carrier.

In addition, the collection agents also use other "gimmicks" designed to invalidate rates which were published in a carrier's individual tariffs. By manipulating tariff rules and restrictions, these published rates are alleged to be inapplicable due to a variety of technicalities, including miscellaneous rules or classifications published in separate tariffs.

The problem has grown to the point where conservative estimates set outstanding claims at more than $200 million. Many of these claims involve small businesses and shipments made as long as five years after the fact. The costs of the negotiated rate crisis extend far beyond $200 million. The scarce resources of many thousands of American businesses are being directed to examine a multitude of often poorly documented and highly technical claims by collection agencies that additional money is owed. These unnecessary costs ultimately fall on the consumer -- costs that are the direct result of a naked exploitation of certain provisions of the Interstate Commerce Act.

The shipping community sought to stem this burgeoning problem by seeking redress at the Interstate Commerce Commission. A petition for rulemaking first was filed by the League with the Commission in 1985. It ultimately resulted in adoption of the Commission's *Negotiated Rates* policy statement. Under that policy, the Commission has been examining on a case-by-case basis whether auditing firms and others pursuing undercharge claims are engaged in an unreasonable practice in violation of the Interstate Commerce Act.

Specifically, the Commission exercised its statutory authority to bar carriers from engaging in unreasonable practices by examining all circumstances surrounding an undercharge claim. The Commission recognized that Congress intended the competitive reforms of the Motor Carrier Act substantially would change the motor carrier industry from a tightly regulated to a market oriented one. The Commission also recognized that many shippers had been negotiating with carriers in good faith, and had reasonably relied upon carrier representations that the offered rates would be appropriately placed in tariffs.

The Commission rightfully concluded Congressional intent thoroughly would be undermined if the agency was to allow third parties with no connection to the provision of the transportation services to distort past market decisions and reap exploitative windfalls. To prevent such an undesired and unanticipated outcome, the Commission offered to review complaints by shippers about undercharge claims, and to find these claims to be unreasonable if a shipper could demonstrate that it had reasonably and in good faith agreed-to and was charged a particular rate by the carrier.

In the recent Supreme Court decision in *Maislin*, seven of the nine justices concluded that the tariff filing requirements of the Act, as historically interpreted, prohibit the Commission from offering shippers this limited and carefully designed relief. This decision is a tremendous disappointment.

The Justices concluded that the tariff filing and non-discrimination provisions of the Interstate Commerce Act, as they have been interpreted by the Court in the past, prohibited the Commission from finding that it would be an unreasonable practice to collect on an undercharge claim based on the fact that a different rate had been negotiated and assessed.

Unfortunately, the Court's unanticipated refusal to defer to the Commission's attempt to respond to current transportation market conditions entails very costly consequences for the shipping public and consumers. The Court explained that if shippers are to obtain even this carefully measured relief, they must do so based upon legislation enacted by Congress.

It is these events which have brought the League here before you today. The shipping and carrier communities are unanimous in their view that legislative change is necessary if the nation's transportation system is to continue to realize the benefits which have flowed since 1980.

In order to achieve this, the League and others jointly support a three part proposal very similar to H.R.3243. Our proposal differs from H.R.3243 to the extent needed to reflect the results of the Supreme Court's ruling in *Maislin*. As currently written, H.R.3243 would require that courts refer negotiated rates cases to the Commission but *Maislin* has ruled that the Commission is without statutory authority to award relief. Our changes to H.R.3243 make it clear that the Commission can award shippers appropriate relief. In our opinion, this legislation will not place additional regulatory responsibilities upon the Commission. We urge that the House enact this legislation this session.

The first part of our proposal would clarify the right of the Interstate Commerce Commission, under its unreasonable practice authority, to examine the reasonableness of undercharge claims and the right of shippers to obtain relief where appropriate. This part of the proposal would apply to motor common carriers and non-household goods freight forwarders during the time the latter were under ICC regulation. It basically would codify the Commission's existing negotiated rates policy statement and would apply it to pending as well as future claims. Under our proposal, the Commission is directed to submit a report to Congress within a year after enactment concerning the current state of the negotiated rates problem, and whether there is a continuing need for an unreasonable practice remedy in this area.

The second part of our plan basically is identical to H.R.3243. It reduces the statute of limitations for undercharge and overcharge claims from the existing three year period to a two year period upon date of enactment. The limitations period would be reduced to 18 months one year thereafter. However, it does include a technical change not currently reflected in H.R.3243 which clarifies that shippers retain an existing right to a six month extension if a carrier declines an overcharge claim during the final six months of the applicable limitations period. The League believes that these are appropriate time frames which will allow shippers and carriers more promptly and efficiently to review their records to determine whether correct and appropriate payment has occurred.

The third and final part, like H.R.3243, would allow the Commission to adopt procedures whereby shippers and carriers informally can resolve inadvertent tariff errors. The provision reflects the necessity, in light of the current volume of tariff filings, for shippers and carriers to avoid liability for unintended overcharges and undercharges. It allows paperwork violations to be corrected without invoking the criminal and civil penalties of the Elkins Act.

These changes will allow shippers and carriers to reduce substantially the potential for future overcharge and undercharge claims. Such a procedure is consistent with a long held position of the League that motor carriers and shippers should be able readily to obtain ICC permission to waive undercharges or pay reparations where technical violations of tariff rates or rules were unintended or inadvertent.

In conclusion, I would again like to thank the Subcommittee for this opportunity to present the League's views. The negotiated rate problem is currently one of the most pressing in the transportation industry. With all deference to the Supreme Court, we are of the view that its recent decision failed to implement the true intent and policy of this Congress. Enactment of remedial legislation now is critically necessary.

We hope that with your leadership and guidance we can reaffirm the true intent of the Motor Carrier Act of 1980, and assure that shippers, especially small businesses, are not forced to pay hundreds of millions of dollars to third parties who had no role in providing transportation services and who will not be returning those dollars to our national transportation system. We look forward to working with you and your staff on this important issue and enacting H.R.3243 during the 101st Congress.

Thank you Mr. Chairman. I would be happy to answer any questions.

* * *

STATEMENT OF
JOSEPH CANNY
DEPUTY ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS
U.S. DEPARTMENT OF TRANSPORTATION
BEFORE THE SURFACE TRANSPORTATION SUBCOMMITTEE
OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
UNITED STATES HOUSE OF REPRESENTATIVES
REGARDING SHIPPER UNDERCHARGES
JULY 19, 1990

## Introduction

Good morning, Mr. Chairman, and Members of the Committee. Thank you for inviting me here today to discuss the Department of Transportation's views regarding the "shipper undercharge" issue. Ten years after the substantial reforms of the Motor Carrier Act of 1980, much has been learned and much has been gained. One thing we have learned in the past year is that, had we achieved more complete economic deregulation of the trucking industry in 1980, this hearing would not be necessary in 1990.

## Statement of the Problem

Partial deregulation has encouraged shippers and carriers to negotiate rates, in many cases in the form of discounts from tariff rates on file with the Interstate Commerce Commission (ICC). The negotiation of prices between buyer and seller is a common business practice for most industries, and we see no good reason, from a public policy perspective, why it should not be permitted in the trucking industry as well.

For the past several years, shippers have been besieged by undercharge claims and related court collection cases. These matters have arisen primarily from motor carrier bankruptcies and financial reorganization proceedings.

In a typical case, the motor carrier has negotiated a rate with the shipper, agreed to it either in writing or orally, and then filed the rate with the ICC either incorrectly or not at all. Such a negotiated discount rate is only legal if it is filed with the ICC. Common carrier truckers must still file all their tariffs with the ICC, although contract carriers have been exempt from this requirement since 1983, and, of course, all domestic air cargo shipments have been exempt from any such requirements since 1979.

If the discounting carrier subsequently goes out of business, the shipper may be sued by a collection agent. Trustees for some bankrupt carriers, attempting to maximize the assets to be distributed to the stockholders and creditors, have sold the carriers' old accounts receivable to auditors and collection agencies, who compare the freight charges paid with the actual tariffs on file at the ICC and in effect on the date of the shipment. If the charge on the bill is a discounted rate not on file, the auditor sends a bill to the shipper for the balance due, the "undercharge." Shipper representatives have estimated that about $100-200 million in undercharges are at stake.

## Efforts to Solve the Problem

Should a shipper fail to pay these undercharges, the trustee or auditor may take the shipper to court to collect the difference between the filed rate and what was actually paid. In some cases, the courts have asked the ICC for its advice on what is the lawful rate. Applying its Negotiated Rates Policy the Commission would find that a carrier had engaged in an unreasonable practice if the facts showed that the shipper and carrier had negotiated a rate, the shipper reasonably relied on that rate, the negotiated rate was billed and payment at that rate was accepted, and the carrier willfully or otherwise failed to file the negotiated rate.

The Supreme Court, in its June 21, 1990 decision in Maislin Industries v. Primary Steel, overturned the Commission's Negotiated Rates Policy. It found that the underlying purpose of the Interstate Commerce Act requires that a motor common carrier publish its rates in a tariff filed with the Commission. The Court has consistently held that this statutory requirement, referred to as the "filed rate doctrine," forbids equitable defenses to the collection of the filed tariff. Moreover, it found that the Commission had not established that the failure to file the negotiated rate was an unreasonable practice which justified a deviation from the filed rate doctrine. Finally, the Court noted that the Motor Carrier Act of 1980 did not alter this statutory requirement. It observed that "Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme...and did not see fit to change it..." Therefore, a legislative change is necessary to eliminate this archaic and obsolete requirement.

Last year a proposed legislative solution to the undercharge problem was agreed to by certain shipper and motor carrier groups. It was proposed that courts would refer undercharge cases to the ICC for its assessment as to the reasonableness of the practices at issue. This was acceptable to shippers and carriers because of the Negotiated Rates Policy that was in effect at the time. It is our understanding that these groups have revisited the issue and have proposed changes to that proposal in order to address the Supreme Court's ruling. As we understand it, this proposal would allow the ICC to review such cases and find that a failure to file a negotiated rate is an unreasonable practice and thus would constitute a defense to the filed rate doctrine. However, it would not address the cause of the problem.

Causes of the Problem

"Truck deregulation" has been extremely successful in providing benefits to shippers, as well as to the overall economy. Consequently, it is not surprising that it has been one of the more popular economic reforms of recent decades. Nevertheless, we should bear in mind that what actually occurred in 1980 was not total "deregulation."

For example, while entry into the trucking industry was made somewhat easier by the MCA, motor common carriers must still acquire certificates from the ICC in order to operate. In addition, although there is now increased rate competition in response to market forces, collective ratemaking still exists. Moreover, motor common carriers must still file their rates at the ICC, even when those rates are independently set. These are just a few of the more significant statutory requirements that continue to apply to interstate trucking.

Many of the reforms that this Committee examined in 1980 remain on the agenda in 1990. The "shipper undercharge" issue relates in a very direct way to one of these key issues: the requirement that interstate motor common carriers file their tariffs at the ICC. In addition, these carriers must also -- as the Supreme Court recently reiterated in Maislin -- adhere to the exact letter of their tariffs even where the shipper and carrier have agreed to a different rate. However, if the tariff filing requirement and the requirement to adhere to the tariffs as filed were to be abolished, the shipper undercharge problem would disappear.

Imagine for a moment that auto prices had to be filed at a federal agency by dealerships across the nation. Negotiations take place between you and the salesman; the manager approves a discount price, and a deal is struck -- except that two or three years later, the dealership comes to collect the difference between the price you paid and the filed price. And to top it all off, the courts agree that you have to pay.

Is this the way to do business in any industry? We see no reason why the trucking industry should be treated any differently from most other industries with respect to the validity of business contracts.

Proper Context for Solving the Problem

We would prefer to deal with the shipper undercharge problem in the context of additional deregulation of the motor carrier industry, as set forth in the ICC sunset bill which, because it eliminates tariff filing, would also solve the undercharge problem. However, we recognize that shippers face an immediate problem because of the Supreme Court's ruling.

We have had only a few days to review the proposal recently agreed to by the American Trucking Association and the NIT League. This legislation appears to be a workable solution to the accumulated undercharge cases in light of the Court's decision in Maislin. However, we cannot support this approach unless it includes a long term solution to the underlying problem.

On a technical level, based on our preliminary review, we believe that several modifications are needed. First, the Supreme Court in Maislin did not reach the issue of whether an unreasonable practice justifies a departure from the filed rate doctrine. The ATA/NITL proposal does not specifically address this issue, but states that in certain situations the Commission may find an unreasonable practice. Therefore, we suggest that proposed section 11705(b)(4)(a) specifically state that an unreasonable practice in these types of situations justifies a departure from the filed rate doctrine. We suggest the following language:

> If the Commission determines that collection of the additional amount is an unreasonable practice, the originally billed and collected charge shall be the lawful rate even though it was not filed with the Commission as required under sections 10761 and 10762.

Second, the proposal creates another hurdle for shippers. It requires the Commission to determine that a grant of relief would not "authorize an intentional violation of antirebating provisions of this subtitle nor result in unreasonable discrimination." It is our understanding that the reference to the antirebating sections are to the provisions of the Elkins Act which are contained in 49 U.S.C. §§ 11901, 11902, 11903, and 11914. We do not believe this requirement is either necessary or desirable in today's business environment. If the requirement is retained, the specific statutory sections should be listed to eliminate any doubt as to what antirebating provisions are included.

However, more fundamentally, we question the validity of this provision, which we believe could make it difficult for shippers to obtain relief. Would the shipper have to present specific evidence showing that it had no knowledge that the negotiated rate was not filed with the Commission; would the shipper have to establish that the motor carrier did not knowingly charge less than the filed rate; and would the shipper have to affirmatively show that no other similarly situated shipper received transportation at a higher rate? As you can see, this requirement could expand what has been a relatively straightforward ICC proceeding on whether there was a negotiated rate into an extended unreasonable discrimination and antirebating proceeding.

Third, we do not believe that the section 4(b) 18-month limitation period on the relief provided by this proposal is warranted. The injustice of a carrier agreeing and accepting payment of a rate lower than the filed tariff rate, then subsequently filing a claim for payment of an undercharge, does not disappear after eighteen months.

We do not believe the filed rate doctrine is compatible with either a modern, efficient transportation system or the way shippers must conduct their business in a competitive global economy. Perhaps it was a reasonable way to operate in the early part of twentieth century, but with thousands of competitors and millions of rates and complicated tariffs, there is no practical way for even sophisticated shippers to protect themselves from the undercharge problem, as long as the filed tariff doctrine is given the judicial weight it was accorded in Maislin. Shippers will once again be ensnared in the regulatory web of the filed rate doctrine, necessitating Congressional action once again. Therefore, this relief should continue until Congress addresses the broader solution of motor carrier deregulation.

We believe the compromise approach constitutes a band aid, where major surgery is needed.

Thus, we urge you to modernize the tariff filing requirement, in the light of today's fast-paced international economy. One option that falls short of total deregulation would be to eliminate the requirement that motor common carriers file their tariffs with the Commission. Rates that result from negotiations between a shipper and a common carrier could be specifically exempt from tariff filing requirements. However, the tariff filing requirement should not be eliminated for motor common carrier rates that are collectively set pursuant to section 10706. As long as rate bureaus continue to have antitrust immunity, the collectively set rates should be filed with the ICC and subject to their scrutiny. However, it should be made clear that carriers and shippers have the right to negotiate whatever rates are mutually agreeable.

## Conclusion

We believe the shipper undercharge problem should be addressed, in the interest of sound public policy, good business practice, and fairness to shippers and carriers. However, the general approach of both H.R. 3243 and the new proposal constitutes only a stopgap solution. The Administration would prefer a permanent solution: the elimination of tariff filing requirements for independently-set rates.

If you determine a legislative solution involving changes to the tariff filing requirement is warranted, we would be happy to work with you in drafting the appropriate language.

## Summary of the Statement of
## Robert E. Davis
## Transportation Cost Control
## (In the Matter of Legislation Seeking Resolution of the Bankrupt Motor Carrier Balance Due Bill Crises)
## and/or
## HR 3243 and others

Many have been blamed for the problems we are today experiencing with Bankrupt or Out of Business (BOOB) Carriers, the Supreme Court, the ICC, the Bankrupt Carrier, their collection agencies.

The ICC tried to implement a remedy, MC-177, but The Court found that an unreasonable practice did not alter the filed rate doctrine.

I, and other consultants, have been fully supportive of a legislative answer to the BOOB carrier problem, but have been opposed to a reduction in the statute of limitations from 3 years to 18 months.

Officials of some of the organizations here today who are supportive of the reduction have candidly admitted that the length of the statute period, did not, does not, and cannot cause the BOOB carrier problem.

Reduction of the statute will be harmful to hundreds of thousands of small utilizers of regular common carriers, and is not essential to statutory relief for the BOOB carrier problem.

Since we all like to lay blame at someone's feet, I believe that much of it has to be at the ICC. In the last few years I believe they have failed to uphold the law. They were set only upon their own course of administrative deregulation.

The Supreme Court has pointed out that penalties are provided for violations of the Interstate Commerce Act (ICA); that the ICC permitted or created a situation where rate discrimination has/can occur; protection against rate discrimination is paramount.

Legislative relief, coupled with vigorous enforcement of our current laws, is needed.

BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION
of the
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

UNITED STATES SENATE

(Oversight Hearings)

(In the Matter of Legislation Seeking Resolution of the
Bankrupt Motor Carrier Balance Due Bill Crises)

(July 17, 1990)

and

SUBCOMMITTEE ON SURFACE TRANSPORTATION
of the
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

HOUSE OF REPRESENTATIVES

(HR 3243)

(July 19, 1990)

Submitted by:

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Mr. Chairman and members of the Committee, my name is Robert E. Davis and I am President of Transportation Cost Control, a Clackamas, Oregon based firm of transportation consultants. I am also President of the National Association of Freight Transportation Consultants (NAFTC). NAFTC has also submitted comments on HR 3243, and I am prepared to answer questions on either that statement or my own.

Many here today will (have) undoubtedly chastise(d) the Supreme Court for their recent decision in MAISLIN INDUSTRIES v. PRIMARY STEEL, INC. (No. 89-624), and lay a great deal of blame at the Court's feet for the urgency of these hearings.

Many of us have been extremely vocal in our past criticism of the Interstate Commerce Commission (ICC) for what we could see was a total lack of concern for enforcement of tariff filing requirements and other regulatory guidelines.

Many will fault the Bankrupt or Out of Business (BOOB) motor carriers and the collection agencies who are seeking to collect outrageous sums from the victims of these unscrupulous motor carriers.

The ICC tried to apply a large bandaid, MC-177, an effort initiated by NITL to have the ICC do something about the growing mountain of balance due bills.

A new legislative effort was put forth, primarily spearheaded by NITL, NASSTRAC, and SNFCC from the shipper side, and ATA-RCCC from the carrier's side. HR 3243 was the result of that effort.

HR 3243, in it's original form, would have allowed carriers to correct "technical" publishing errors, would have again codified that the ICC is the regulatory agency to make determinations of reasonableness, and would have shortened the statute of limitations to 18 months (currently 3 years).

I, and certainly other consultants, have been fully supportive of any legislative amendment that would have relieved or eliminated the BOOB carrier problem. We were, however, not supportive of a reduction in the statute of limitations.

It has always been my opinion that the length of the statute period does not, did not, and cannot cause the BOOB carrier problem.

Officials of some of the organizations who are here today have candidly agreed that the length of the statute period did not cause the problem.

Why then does this legislative effort contain a shortening of the statute? Because our current viable common motor carriers "only want a little administrative relief". Without that relief (a shortening of the statute), there will be no support forthcoming from these motor carriers. Do I feel like I, and most of my clients, are being held up? Yes.

Why would carriers only want a "little administrative relief"? The current 3 year statute period allows both shippers and carriers to review freight billings. If there are legitimate overcharges or undercharges either party can seek to remedy the situation. Almost any consultant can provide you with figures that will substantite that motor carrier overcharges are, at a minimum, ten times more than undercharges from BOOB carriers.

I have been told by many that unless there is unanimity by those of us here today that this legislative effort will fail, and transportation consultants, NAFTC members in particular, will be grouped with the collection agencies that represent BOOB carriers, ie., we will be the "bad" guys that caused this legislation to fail.

For the record therefore, I support a legislative effort that will help cure the mess we now have. I still do not agree however, that it should be necessary to reduce the statute of limitations to accomplish this. In a poll of my clients over 90% objected to the shorted statute. Other consultants had similar results.

Supporters of the shortened statute will undoubtedly tell you there is no reason that an audit of freight bills cannot be accomplished in 18 months. We have heard that no transportation executive worth their salt would leave bills laying around for a year or two before having them audited.

The majority of my clients do not have transportation executives. If they're lucky they have a shipping/receiving manager, an accounts payable clerk, or a purchasing agent who doubles as their transportation/distribution person.

The shippers represented by NITL and NASSTRAC represent about 1,000 of the largest businesses/shippers in the country, and they regularly assume to speak for all shippers. At the time of our poll I had about 325 clients. 69 responded to my questionnaire. Only 4 were in favor of a shortened statute.

There are several hundred thousand small businesses in the U. S. who utilize common motor carriers. We have attempted in the past to tell you what they have told us:

That there is no reason for them to have to give away one half of their overcharge statute period in order to garner support from their existing carriers for a bill that only corrects the mess created by those who choose not to do their job (s) and regularly and flagrantly choose to not follow the law or not administer the law.

7

Most of my preaudit - freight payment clients (those for whom I am performing current consulting work vs. those only having a post audit of their paid freight bills) have had minimal problems with BOOB carriers.

Those that have had recurring problems are because of one primary reason. They steadfastly refuse to do things properly even after they have been advised, warned, cautioned, etc. on what our laws are. They do not obtain copies of tariff publications, their "contracts" are slips of paper with a rate written on it, many feel that anything goes, and some simply feel that it won't happen to them. I do not have a lot of sympathy for those who knowingly violate or ignore our laws.

In the last few years our regulatory agency, the ICC, gave me the impression that they could care less about upholding the law, and regularly worked to implement their own policy of administrative deregulation. I believe that policy only fostered and reinforced willful violations of the laws passed by Congress.

I'm extremely happy that current Chairman Edward Philbin has told us all that he feels the ICC's only appropriate regulatory role is to be the faithful implementer of the law as written by Congress, and that it has no business fuctioning as a policymaking body.

Besides approving any new law that will provide relief from the BOOB carrier problem, I would also urge this Congress to consider something else.

The ICC is needed. They need some of their funding back. They need adequate staff to do their job. I am not suggesting that a "governmental bureaucracy" be reestablished, but put enough people back to work to adequately monitor proper tariff filing, and eliminate some of the shoddy practices that we now have.

As I read of the soaring cost of our Savings and Loan deregulation fiasco, I ponder over what the bottom line cost will be to transportation. Perhaps we should all feel lucky we are still only talking about millions instead of billions.

The Supreme Court made some other things abundantly clear:

It points out that penalties are provided for violation of the Interstate Commerce Act (ICA), with the implication that they should be applied;

That those who fail to publish could be subject to civil or criminal proceedings relating to fraud, failure to fulfill contracts, and anti-rebating provisions in the ICA;

That the ICC has permitted or created a situation where rate discrimination has/can occur;

Protection against rate discrimination continues to be of paramount importance;

The Court is also very blunt in noting the market power that large shippers have.

Yes gentlemen, we need another law. A law that allows our regulatory agency, the ICC, to make a determination that the application of a rate, other than the negotiated rate, would be an unreasonable rate. Coupled with that, I believe that vigorous enforcement of our current law (s) will have an immediate remedial effect.

In addition to any new law that you may eventually approve, I would urge you to closely monitor it's, and our current laws, implementation.

It would also be heartening to me to see some of the penalties that The Court pointed out, applied to those who fail in their obligation to properly publish and file their tariffs.

Respectfully,

Robert E. Davis

Robert E. Davis

PREPARED STATEMENT OF ROBERT E. DAVIS

## SUMMARY OF THE STATEMENT OF THE NATIONAL ASSOCIATION OF FREIGHT TRANSPORTATION CONSULTANTS IN THE MATTER OF LEGISLATION SEEKING RESOLUTION OF THE BANKRUPT MOTOR CARRIER FREIGHT CHARGE BALANCE DUE BILL CRISIS

(H.R. 3243 AND OTHERS AS APPROPRIATE)

(1) NAFTC SUPPORTS APPROPRIATE LEGISLATIVE TREATMENT OF THIS SERIOUS PROBLEM EXISTENT IN THE FREIGHT TRANSPORTATION INDUSTRY.

(2) NAFTC OPPOSES INCLUSION OF A REDUCTION IN THE STATUTE OF LIMITATIONS APPLICABLE TO OVER AND UNDERCHARGE CLAIMS TO 18 MONTHS IN SUCH LEGISLATION FOR THE FOLLOWING REASONS:

(A) CHANGING THE STATUTE WILL NEITHER ENHANCE NOR DETRACT FROM LEGISLATIVE RELIEF DIRECTED AT THE CRISIS;

(B) REDUCING THE STATUTE WILL UNJUSTLY PENALIZE THOUSANDS OF SHIPPERS WHO HAVE LITTLE OR NO EXPOSURE TO BANKRUPT CARRIER BALANCE DUE BILLS BY FORCING THEM, AGAINST THEIR WILL, TO RELINQUISH ONE-HALF OF THEIR RIGHT TO RECOVER LEGITIMATE OVERCHARGES THAT CARRIERS MUST LEGALLY REFUND;

(C) REDUCING THE STATUTE IS NOT NECESSARY TO ACCOMPLISH LEGISLATIVE RELIEF FROM THE CRISIS -- THE PROVISION IS INCLUDED TO GAIN CARRIER SUPPORT FOR THE LEGISLATION;

(D) CARRIERS WILL NOT BE HARMED BY PASSAGE OF LEGISLATIVE RELIEF DESIGNED TO ADDRESS THIS CRISIS WITHOUT INCLUSION OF A PROVISION TO REDUCE THE STATUTE OF LIMITATIONS.

(3) NAFTC BELIEVES THE U.S. SUPREME COURT APPLIED AN UNDULY HARSH INTERPRETATION TO THE FILED RATE DOCTRINE AND REAFFIRMS ITS BELIEF IN THE ICC'S NEGOTIATED RATE POLICY AS AN APPROPRIATE SOLUTION.

(4) THE FILED RATE DOCTRINE IS NOT SET ASIDE BY THE ICC'S NEGOTIATED RATE POLICY -- RATHER IT IS STRENGTHENED BY IT BECAUSE THE POLICY WILL NOT ALLOW A CARRIER OR ITS AGENTS TO BENEFIT AS A RESULT OF NEGLIGENT OR FRAUDULENT BEHAVIOR IN CONDUCT OF BUSINESS AND PERFORMANCE OF STATUTORY DUTIES.

(5) CARRIERS AND SHIPPERS MUST HAVE RELIEF FROM PENALTIES IMPOSED BY PRESENT STATUTES WHEN LEGITIMATE TARIFF FILING ERRORS THAT COULD PRODUCE FREIGHT CHARGE DISCREPANCIES OCCUR, SUBJECT TO ICC REVIEW, AS ORIGINALLY PROPOSED IN HR 3243.

(6) NAFTC IS COMMITTED TO APPROPRIATE LEGISLATIVE RELIEF FOR THIS CRISIS AND HOPES CONGRESS WILL ACT QUICKLY TO GRANT SAME, BUT, THAT IN SO DOING IT DOES NOT INADVERTENTLY PENALIZE THOUSANDS OF OTHER SHIPPERS, LARGE, MEDIUM AND SMALL, WHO ARE INNOCENT BYSTANDERS AND ARE ENTITLED TO EQUAL CONSIDERATION AND STANDING.

# STATEMENT OF THE

# NATIONAL ASSOCIATION OF FREIGHT TRANSPORTATION CONSULTANTS (NAFTC)

IN THE MATTER OF

LEGISLATION SEEKING RESOLUTION OF THE
BANKRUPT MOTOR CARRIER FREIGHT CHARGE
BALANCE DUE BILL CRISIS
(H.R. 3243 AND OTHERS AS APPROPRIATE)

DATED: JULY 10, 1990

NATIONAL ASSOCIATION OF FREIGHT TRANSPORTATION CONSULTANTS
P.O. BOX 21418
ALBUQUERQUE, NM 87154-1418
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The National Association of Freight Transportation Consultants (NAFTC), is as its name states, a professional association of companies and individuals engaged in the provision of freight transportation consulting services to shippers, carriers and others. NAFTC has submitted earlier statements to Congress concerning HR 3243, the first proposed legislation designed to treat the bankrupt motor carrier freight due bill crisis the industry is experiencing.

While NAFTC has never opposed legislative relief for this problem it has vigorously opposed the inclusion of a provision in the legislation that would reduce the statute of limitations applicable to freight overcharge and undercharge bills. Our opposition to that concept was and is based on the following:

(1) The ICC's Negotiated Rates Policy, which this bill would codify, deals with a particular problem -- freight balance due bills emanating from bankrupt motor carriers. Changing the statute of limitations will neither improve nor detract from that policy.

(2) The statute change was part of a deal negotiated with motor common carriers by one shipper group (NASSTRAC) pursuing an agenda beneficial to its members, that was subsequently joined by others (NITL et al), in return for carrier support of this proposed legislation. That is its sole function -- to garner carrier support for this legislation. NAFTC has been advised by several of the involved parties that if there was not united support the bill would fail passage in Congress.

Compromise is a fact of life and NAFTC has no objection to it if the end result will be an improved atmosphere in which both shippers and carriers can function efficiently. However, NAFTC subscribes to "win-win" negotiation -- a situation that results when all parties involved are treated equitably.

Not all shippers, as has been illustrated by the surveys NAFTC members have taken of their shipper clients (the results of which have been transmitted to Congress), favor a reduction in the statute of limitations applicable to over and undercharge claims. Many medium and small sized shippers have little if any exposure to bankrupt carrier freight due bills as they were unable to negotiate the large discounts (up to 70% off of tariff rates) bestowed on their larger, oftentimes competing, shipper brethern. As a result these shippers overcharge claims far outweigh any balance due bills they have received or might receive in the future from bankrupt carriers.

NAFTC feels these objections to a reduction in the statute applicable to over and undercharge claims remain valid.

NAFTC is also of the opinion that the ICC, primarily under Chairman Gradison's leadership, bears the lion's share for creating the situation that exists today and that generated this court decision. The failure of the Commission to enforce tariff filing requirements is the primary culprit. Congress is to be complimented on its recent appointment confirmations as they have gone a long way to restoring the ICC to the independent regulatory agency it is supposed to be.

However, that does not mean the Negotiated Rates Policy formulated by the Commission is in error. NAFTC agrees with the dissenting justices in the U.S. Supreme Court's decision in Maislin vs. Primary Steel. The decision's interpretation of the filed rate doctrine is unnecessarily harsh. It does apply an even stricter interpretation to the filed rate doctrine than in the past. NAFTC believes:

(1) the ICC can legitimately review all the circumstances surrounding a negotiated rate that has been subjected to a balance due bill;

(2) that unreasonable practices are a proper basis upon which to find such balance due bills uncollectable because they can make the rate unreasonable;

(3) that the filed rate doctrine is not set aside by such a policy;

(4) that, the filed rate doctrine can actually be strengthened by the Negotiated Rates Policy because a carrier (or its agents) would not be allowed to benefit as a result of negligent or outright fraudulent behavior in performance of statutory duties;

(5) that a shipper should not be forced to seek a court referral to obtain relief from these types of carrier practices, it should be able to petition the ICC directly;

(6) that there are sufficient penalties contained in the IC Act to punish carriers and their officers who fail to file rates, and, shippers and carriers who would collude for any reason in negotiating truly secret rates, and, that the ICC should and must enforce those penalties;

(7) that carriers and shippers, should be given some relief from Elkins Act and other penalty provisions (as proposed in this legislation) to cover legitimate oversights resulting from untimely tariff publishing (subject to ICC review).

It is a fact that reduction of the statute is not necessary to codification of the ICC's Negotiated Rates Policy. It is also a fact, that legalization of the ICC's Negotiated Rates Policy is neither beneficial nor detrimental to motor common carriers. The statute reduction provision in this legislation is only there because it is what the carriers want in exchange for their support. United support is apparently not possible without this concession to motor carriers even though they have been offered reasonable alternatives -- such as reducing the statute to 24 months -- which they rejected.

NAFTC's members are professional consultants who are able to look at both the shipper and carrier side of this issue. We believe what the carriers want asks too much and will work hardships and exact unfair penalties from smaller and medium sized shippers who have very limited exposure to balance due bills, because they have not been the beneficiaries of large discounts. Our members report many of their shipper clients repeatedly ask why they should be asked to forfeit half of their right (from 36 months to 18 months) to recover legitimate overcharges from motor carriers when they bear minimal risk of exposure to bankrupt carrier claims for additional freight charges? NAFTC asks the same question of Congress. There are hundreds of thousands of these small shippers out there and they do deserve an answer.

NAFTC remains firmly committed to legislative relief for the bankrupt carrier due bill situation and believes that can be accomplished without reducing the statute of limitations applicable to over and undercharge claims. Many shippers have been victimized by desperate and/or unscrupulous motor carriers who went bankrupt and that problem needs to be addressed. NAFTC hopes Congress will act quickly to provide that relief, but, that in so doing it does not inadvertently penalize thousands of its other constituents, large, medium and small, all of whom are entitled to equal consideration.

Robert E. Davis

ROBERT E. DAVIS, President

Donna F. Behme

DONNA F. BEHME, Executive Director

UNITED STATES OF AMERICA
HOUSE OF REPRESENTATIVES
SURFACE AND TRANSPORTATION SUBCOMMITTEE
HOUSE PUBLIC WORKS COMMITTEE

# TESTIMONY OF F. WAYNE ELGGREN, CPA
# ON
# PROPOSED LEGISLATION

H.R. 3243

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*Certified Public Accountants*

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The Honorable Norman Y. Mineta, Chairman
Surface and Transportation Subcommittee
House Public Works Committee

TESTIMONY OF F. WAYNE ELGGREN

1. I am a certified public accountant, licensed to practice in the state of Utah.

2. I am a named partner in the certified public accounting firm of Neilson, Elggren, Durkin & Co. Neilson, Elggren, Durkin & Co. has offices in Los Angeles, California; Salt Lake City, Utah; Phoenix, Arizona and Santa Ana, California.

3. I am a member of the National Association of Bankruptcy Trustees.

4. My firm and I specialize in bankruptcy matters and I am now and have been a trustee in large reorganization and liquidation proceedings under the United States Bankruptcy Code ("Bankruptcy Code"). I have attached a more complete resume of myself and my firm as Exhibit 3 to this testimony.

5. I was the in-charge manager of my former employer as it acted as the trustee of IML Freight, Inc. ("IML"), a less than truckload ("LTL") common carrier which filed for protection under Chapter 11 of the Bankruptcy Code in July of 1983.

6. After a period of attempted reorganization, IML commenced liquidation under Chapter 7 of the Bankruptcy Code.

7. IML operated in approximately 85 terminals in 30 states under various ICC interstate authorities, had approximately 2,000 employees and annual revenue of $200 million at its highest level.

8. I am the partner-in-charge of our firm's current appointment as accountants and consultants to the Trustee of Transcon Lines ("Transcon").

9. Transcon filed for protection under Chapter 11 of the Bankruptcy Code in early May of this year and it was subsequently converted to Chapter 7 and is in the process of liquidating its assets to pay creditors.

10. Transcon operated a terminals network of 247 locations under various ICC interstate authorities, had approximately 4,000 employees and annual revenue of $344 million at its highest level.

11. In addition to my background in liquidating IML and as accountant to the Trustee of Transcon, I am appearing today at the request of the Trustee of Transcon, Leonard L. Gumport.

## Tariff Undercharge Background

12. As you are aware, tariffs have been established as a mechanism to insure that all shippers have non discriminated access to services provided by common carriers ("Carrier"). Filed tariffs are supposed to prevent a carrier from giving a shipper with large volumes of business an advantageous price over the smaller shipper who needs the same kind of service but has lesser volume.

13. As carriers bill shippers for services, the carrier sometimes makes an error in applying the proper tariff. This can result in either an overcharge or undercharge of the shipper. These errors arise totally without intent on the part of the carrier.

14. In other circumstances, the carrier grants a discount to a shipper to try to get or maintain business. Initially, this discount may discriminate against other shippers utilizing the same kind of service. Subsequently, the carrier may file a change in the tariff to allow all shippers to participate in the reduced rate. Not infrequently, the carrier does not file new tariffs or may delay filing them, thereby, allowing some shippers more beneficial rates than others. The larger shipper is almost always the beneficiary of the discount while the smaller shipper does not participate to the same extent.

15. Discounts to shippers are given in different forms. The discount can appear as a reduced rate, a misclassification of cargo, and sometimes the balance owed by a shipper is written-off as a bad debt.

16. When a carrier goes into liquidation through bankruptcy, the trustee frequently establishes a program to audit for tariff undercharges. This tariff undercharge program is established primarily to recover funds to pay creditors.

17. A secondary result of the a trustee's audit for tariff undercharges is the elimination of the discrimination caused by the illegal discounts.

Loss of Funds Available to Pay Creditors

18. In the IML case and now in the Transcon case I am directing a program to recover tariff undercharges made by these carriers within the three years before their bankruptcy petitions were filed.

19. Recovery of tariff undercharges is a very substantial part of the funds available to pay creditors. These funds are typically unsecured and, therefore, available to pay unsecured claims.

20. Without these funds, creditors of IML and Transcon (and other carriers) will receive substantially smaller distributions from these estates. Specifically, the following types of claims (many of which are priority unsecured claims) will be impacted:

a. employee wage claims,

b. employee pension plan contributions,

c. Internal Revenue Service,

d. claims of federal agencies (Pension Benefit Guarantee Corporation),

e. state taxes (employee, unemployment, motor fuel and property),

f. other unsecured claims, and,

g. loss of claims to be offset against and effectively pay creditors and shippers.

The IML Experience

21. I personally developed and directed a program whereby some of the IML employee/rate auditors audited all the freight bills for the three years before the filing of the bankruptcy petition. The focus of the audit was to identify billings to IML shippers below the tariff rates IML had filed with the ICC. In this effort we recovered approximately $3 million for distribution to creditors.

22. This $3 million became the fourth largest source of funds in the estate to pay creditors during the liquidation. The largest source of funds came from the sale of assets (buildings, tractors and trailers), the majority of which went to pay secured creditors.

23. The second largest source of funds came from the recovery of preferential transfers pursuant to Section 547 of the Bankruptcy

Code. These recoveries effectively redistributed between creditors funds that were paid out during the 90 days before the filing of the bankruptcy petition.

24. The third largest source of funds came from outstanding accounts receivable. Recoveries from these and other sources were and are being distributed to creditors of IML.

25. It is important to note who the creditors were that have and will receive these funds. Attached as Exhibit 1 is a summary of the 50 largest creditors who will be the beneficiaries of the funds reclaimed from the tariff undercharge recovery program I directed and other liquidation programs. In summary the funds will go to the following types of creditors:

| | |
|---|---|
| Employee Pension Plans | 33% |
| Internal revenue service | 15 |
| State agencies and taxes | 9 |
| Other unsecured creditors | 44 |
| Total | 100% |

26. The employee pension plans and Pension Benefit Guaranty Corporation claims are for unpaid contributions covering approximately 2,000 employees in 30 states. These employee pension plans include the International Brotherhood of Teamsters, various machinist unions, various office employee unions and a salaried employee plan.

## The Transcon Experience

27. Based on my review and discussion with Transcon employee/rate auditors I estimate that there are approximately $20 million in tariff undercharges that will be billable to shippers. Recovery of these funds is an essential part of the Trustee's program to liquidate assets and pay creditors.

28. Exhibit 2 is a summary of a preliminary list of the 21 largest unsecured creditors as filed with the Bankruptcy Court. Based on these largest creditors, the funds recovered by the Trustee would be applied as follows:

| | |
|---|---|
| Employee Wage claims | 42% |
| Employee Pension Plans | 41 |
| Other unsecured claims | 17 |
| Total 21 largest creditors | 100% |

29. I have not included taxes in this analysis due to the fact that the bankruptcy schedules of claims have not been completed and filed with the Bankruptcy Court.

30. In both the IML and Transcon situation, loss of the tariff undercharges as a method of recovery of assets to pay creditors would hurt employees, and state and federal taxing authorities and agencies.

31. In addition to the employee and tax type claims, there are thousands of small unsecured creditors of Transcon that will benefit from the recovery of the tariff undercharges.

## Claims by Shippers for Tariff Overcharges

32. In both the IML and Transcon cases, shippers made or are making claims for tariff overcharges on billings made during the three years before the filing of their bankruptcy petitions. Valid overcharges become allowed claims against the carrier. These claims are generally prepetition unsecured claims and can create a valid setoff against any amounts owed by the shipper to the carrier.

33. In the IML case shippers made claims for overcharges for approximately $2.5 million. Many of these claims were satisfied out of setoffs against the amounts shippers owed IML.

34. In the Transcon case, shippers have filed tariff overcharge claims totaling approximately $.5 million and will continue to do so until the applicable statute period expires.

35. Elimination of the carrier's claim against shippers for tariff undercharges is totally inconsistent with shippers continued ability to make claims against carriers for tariff overcharges.

36. While IML and Transcon were operating before their bankruptcy petitions, shippers filed claims for tariff overcharges with each of them. Because of the competitive pressures, both these carriers paid shippers overcharge claims up to the time they filed for bankruptcy and seldom made demand for tariff undercharges. In the case of Transcon over $6 million has already been paid out to shippers during the three years before the filing of its bankruptcy petition.

37. It is totally one-sided for Congress to disqualify carriers, as contemplated in H.R. 3243, from making claims against shippers for tariff undercharges while shippers have already had the benefit of collecting overcharges from carriers.

## Conclusion

38. Elimination of a carrier's ability to recover tariff undercharges will dramatically hurt creditors of bankrupt carriers. These creditors include employee wage claims, pension plan contributions, and federal and state taxes.

39. Many shippers have already been paid for tariff overcharge claims by the bankrupt carriers. Elimination of the carrier's ability to recover tariff undercharges would be totally unequitable.

39. Recovery of tariff undercharges is the only way to prevent carriers from price discrimination among shippers.

F. Wayne Elggren, CPA
Partner
Neilson, Elggren, Durkin & Co.

Exhibit 1

Page 1 of 2

IML Freight, Inc.
Chapter 11
Analysis of 50 Largest Claims

| Name of Claimant | Claim |
|---|---|
| Employee Pension Plans: | |
| International Brotherhood of Teamsters Chicago Loca | $37,026 |
| East Bay Drayage Drivers (H&W) | 105,226 |
| International Brotherhood of Teamsters Chicago Loca | 130,273 |
| Utah Idaho Teamsters Security Fund | 184,803 |
| Welfare and Pension Fund for the Mid-Jersey Truckin | 115,679 |
| Automotive Machinists Pension | 121,090 |
| Central States Health and Welfare Fund | 429,227 |
| Western Teamsters Welfare | 1,436,013 |
| Central States Pension Fund | 611,606 |
| Western Teamsters Conference Pension | 1,562,376 |
| Pension Benefit Guaranty Corp | 38,883 |
| Total Employee Pension Plans | 4,772,202 |
| Internal Revenue Service | 2,161,546 |
| State Taxing Authorities and Agencies: | |
| State of Arizona Transportation | 79,735 |
| State of Washington Labor | 65,725 |
| State of Pennsylvania Off Atty General | 34,254 |
| State of Ohio Employment | 44,301 |
| State of Wyoming Revenue & Tax | 86,964 |
| State of California Employment | 65,396 |
| State of Ohio Workers Compensation | 100,317 |
| State of Utah Employment | 136,275 |
| State of Utah Tax Commission | 653,741 |
| Total State Taxing Authorities and Agencies | 1,266,709 |
| Other Creditors: | |
| AT&T Communications | 151,867 |
| State of Oregon Public Utilities | 63,332 |
| Denver & Rio Grande | 132,772 |
| Patterson Ranch Inc | 69,079 |
| Air Cargo Delivery Service | 138,239 |
| Watkiss & Campbell | 110,585 |
| Intermountain Automotive Industries Ins | 154,644 |
| Southern Railway Company | 149,524 |
| Lynden Transport & M P Morris | 194,983 |
| Nelson & Harding | 55,147 |
| Anders Associates | 61,621 |
| Mid West Investment Co. | 71,411 |
| Curto Reynolds Oelerich Inc. | 101,257 |

Exhibit 1 Page 2 of 2

IML Freight, Inc.
Chapter 11
Analysis of 50 Largest Claims

| Name of Claimant | Claim |
|---|---|
| Gibson, Dunn & Crutcher | 83,738 |
| Fox & Company | 75,435 |
| Atchison Topeka and Santa Fe | 166,918 |
| Northeast Management Corp. | 88,368 |
| Salt Lake Investors | 327,843 |
| Burlington Northern Railroad | 247,443 |
| LeBoeuf, Lamb, Leiby & MacRae | 123,307 |
| Mountain States Tel & Tel | 482,896 |
| Fruehauf Corp | 195,360 |
| TransAmerica Occidental Life | 372,582 |
| Golden Gate Petroleum Co. | 758,332 |
| Van Cott, Bagley, Cornwall & McCarthy | 291,097 |
| Richards, Brandt, Miller & Nelson | 321,299 |
| Main Hurdman | 350,865 |
| Central Transport Inc. | 1,069,362 |
| Total Other Creditors | 6,409,306 |
| Grand Total | $14,609,764 |

Source: IML Trustee's records and reports to Court.

Exhibit 2

Page 1 of 1

TRANSCON LINES
Chapter 11
Analysis of 21 Largest Claims

| Name of Claimant | Claim |
|---|---|
| Employee Wages: | |
| International Brotherhood of Teamsters on behalf of employees | $18,000,000 |
| Teamster Local Union 560 | 3,031,420 |
| | 21,031,420 |
| Employee Pension Plans: | |
| Central States Pension Fund | 18,000,000 |
| Central States Health & Welfare | 1,958,097 |
| Central Pennsilvania Teamsters Pension | 502,832 |
| Western Conference of Teamsters Pension Fund | 296,704 |
| Total Employee Pension Plans | 20,757,633 |
| Other unsecured claims: | |
| Transport Indemnity | 2,755,187 |
| Liberty Mutual | 1,916,809 |
| Aetna Life & Casualty | 833,000 |
| Baker and McKenzie | 615,713 |
| Bell Atlantic Systems Leasing | 577,152 |
| Amoco Oil Company | 517,387 |
| Deloitte-Touche | 246,210 |
| Computer Associates | 241,301 |
| Gulf Oil Corporation | 189,704 |
| IBM Corporation | 180,137 |
| Gibson, Dunn & Crutcher | 180,000 |
| Moore Business Forms | 172,737 |
| Union Pacific Railroad | 151,461 |
| Cylix Communications | 133,710 |
| Norfolk Southern | 132,613 |
| Total Other Claims | 8,843,121 |
| Grand Total | $50,632,174 |

Source: Schedule of 20 largest creditor filed by Debtor with the Bankruptcy Court and proof of claim filed by IB Teamsters.

Exhibit 3

# NEILSON, ELGGREN, DURKIN & COMPANY

*Neilson Elggren Durkin & Co.*
*Certified Public Accountants*
*107 South Main, Suite 300*
*Salt Lake City, Utah 84111*
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Phoenix, Arizona [illegible]
[illegible]

Orange County Office
[illegible]
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[illegible]

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(213) [illegible]

Formed in 1986 to specialize in fraud investigations, bankruptcy reorganization, liquidation matters, and to provide valuable assistance to attorneys in litigation, Neilson, Elggren, Durkin & Co. brings together partners and professionals with unique experience, education and skill to meet the challenges facing creditors, debtors, attorneys and court officials.

The Firm's partners and professionals are Certified Public Accountants with Masters' Degrees in Business Administration or former Special Agents with the Federal Bureau of Investigation. The partners have had extensive experience in litigation and consulting departments of international accounting firms and have led and supervised over 200,000 hours of professional time for the following engagements:

| | |
|---|---|
| Triad America Corporation | Trustee, Accountants for the Trustee, UT |
| Newedge Corporation | Accountants for the Examiner, CA |
| Park Meadows Development | Trustee, Accountants for the Trustee, UT |
| Adventureland Video Incorporated | Accountants for the Trustee |
| NP Energy Corporation | Trustee, Accountants for the Trustee, CA |
| Trolley Village Condo H.O.A. | Trustee, Accountants for the Trustee, UT |
| Eckhoff, Watson, Watson & Preator | Accounting Expert, WY |
| Arthur Gillis Associates | Trustee, Accountants for the Trustee, CA |
| Dovie Beams de Villagran | Court-appointed Examiners, CA |
| IML Freight, Incorporated | Trustee, Accountants for the Trustee, UT |
| Landbank Equity Corporation | Accountants for the Trustee, VA |
| Arizona Fuels Corporation | Accountants for the Trustee, AZ and CO |

| | |
|---|---|
| Cottontree Inn | Accountants for the Trustee, ID |
| Utah State Attorney General | Accounting Fraud Expert, UT |
| Summit County Grand Jury | Accounting Expert, UT |
| Jon C. Vasilacopolus | Trustee, Accountants for the Trustee, UT |
| Zions First National Bank | Expert in RICO claims against the Bank |
| Kemper Insurance | Insurance fidelity claim valuation, CA |
| Sunrise Construction | Accountants for the Debtor, WY |
| Great Western Savings | Accounting Expert Testimony on Holiday Inn |
| Cal Themes | Trustee & Accountants for the Trustee, CA |
| Utex Oil Company | Trustee & Accountants for the Trustee, UT |
| Manhattan Plaza | Court-appointed Examiner, CA |
| California Resources Group | Accountants for the Receiver, CA |
| Intermagnetics | Accountants for the Trustee. CA |
| Entertainment Specialties Inc. | Trustee & Accountants for the Trustee, CA |
| Grand Motors | Accountants for the Trustee, CA |
| ST. George Hilton | Accounting Experts, UT |
| Metropolitan Life | Expert Testimony on La Mansion Hotels - San Antonio, Texas |
| Pioneer Chicken | Accounting Expert, CA |
| Traweek Investment Co. | Court-appointed Examiner, CA |
| Utah Title & Abstract Co. | Accountants for the Trustee, UT |

Members of the Firm have presented expert testimony before the following judicial and municipal bodies:

Federal District Courts in Utah, Arizona, Nevada, Virginia and California

Federal Bankruptcy Courts in Utah, Arizona, Colorado, Wyoming & California

State Courts and Grand Juries in Utah and California

State Tax Commission in Utah

City and County Councils and Commissions in Utah and Nevada

# F. WAYNE ELGGREN, CPA

## PARTNER

107 South Main Street
Suite 300
Salt Lake City, Utah 84111
(801) 363-0700

F. Wayne Elggren is a Certified Public Accountant and Partner with the accounting firm of Neilson, Elggren, Durkin & Co. He has over eleven years of experience in public accounting and has been a manager in the Litigation and Consulting Services Departments of the international accounting firms of KMG/Main Hurdman and Fox & Company. As a manager in the Salt Lake City office of KMG/Main Hurdman, Mr. Elggren was the Director of Bankruptcy Services and consulted with and led numerous bankruptcy and litigation consulting engagements across the country including engagements in Virginia, California, Colorado, Arizona, Idaho and Utah.

### EXAMPLES

He was appointed by the Federal Bankruptcy Court in Utah as Trustee in the bankruptcy of Park Meadow Development. In this capacity he operated a golf course and real estate company, sold over $10 million worth of real estate, investigated into the acts and conducts of general partners and financial institutions with regard to their lien status and the recovery of fraudulent conveyances.

Mr. Elggren acted as the Accountant for the Trustee in Triad America bankruptcy and related cases. His responsibilities included investigation into monies taken from Triad America by related entities, claims, preferences, fraudulent conveyances, the sale of an oil refinery and supervision of liquidation of over $50 million of real estate.

He was appointed by the Federal Bankruptcy Court in Utah as Examiner in the bankruptcy of Utex Oil Company where his responsibilities included supervision of receipts and disbursements, investigation into the acts and conduct of the Debtor and an analysis of the ownership of funds held by the Debtor based on various constructive trust theories. Subsequently he was appointed Trustee under a confirmed plan.

Mr. Elggren directed a team of accountants for the Trustee of an oil refinery and acted in various capacities in managing and operating the refinery; investigated the conduct and various transactions of the Debtor and it's owner; and operated a 100,000 acre cattle ranch in Colorado.

He directed accountants and consultants for the Trustee in a mortgage company with $180 million in second mortgages; investigated the conduct of the Debtor and it's owners in schemes to defraud purchasers of the mortgages, and traced millions of dollars of funds diverted to related companies and individuals.

EXAMPLES (continued)

He has computed business losses, evaluated inventory, and determined value of personal property for insurance claims for various entities.

He has consulted, audited and investigated transactions involving hotels and resorts in five states performing various operational analysis, measuring damages due to interruption of operations, liquidating the property and other assets and performed voidable transfer investigations involving properties in bankruptcy.

PREVIOUS EXPERIENCE

- KMG/Main Hurdman, Salt Lake City, Utah

  Appointed Director of Bankruptcy Services in the Salt Lake City office leading a department of approximately twenty professionals in all aspects of insolvency engagements, including Trustee, Accountants for the Debtors-in-Possession, and Accountants for the Trustee.

  Directed and performed insurance investigations of various kinds including business interruption loss computations, inventory reconstruction, personal property valuation, and presentation of reports and expert testimony relative to these matters.

  Directed and performed investigation of employee theft, financial institution fraud, and other fraudulent transactions.

  Valuation of corporations, partnerships, and proprietorships for estate planning, mergers, sales and buy-outs, damage measurement in litigation.

  Construction litigation including reconstruction of project development costs and partner contributions.

- Fox & Company, Salt Lake City, Utah

  Supervised consulting engagements similar to those mentioned above relative to bankruptcy, insurance, valuation and litigation support services.

  Performed audits of financial statements, preparation of tax returns, financial statement analysis, projections, feasibility studies and public utility regulation consulting.

The following are a few of the recent engagements Mr. Elggren has served in positions of primary responsibility:

Triad America Corp. - Largest Bankruptcy in Utah
Accountants to the Trustee

Park Meadows Development - Real Estate Development Co. and Golf Course
Trustee and Accountants for the Trustee

Trolley Village Homeowners Association
Trustee and Accountants for the Trustee

Utex Oil Company - Largest Oil and Gas Company in Utah,
Court-appointed Trustee and Examiner

IML Freight, Inc. - $150 million/year Trucking Company
Trustee, Accountants for the Trustee and

Arizona Fuels Corporation - Oil Refinery and Ranch
Accountants for the Trustee and Receiver

Western Oil Marketing - $200 million/year Petroleum Product Wholesaler
Accountants for the Trustee

Dr. Jonathan Horne - Orthopedic Surgeon; Individual Bankruptcy
Trustee, Accountants for the Trustee

Arrow Huss - Manufacturer of Amusement Park Equipment; Reorganization
Accountants for the Debtor-in-Possession

Landbank Equity - $180 million Second Mortgage Company Fraud
Accountants for the Trustee

Cottontree Inn - Hotel and Convention Center
Accountants for the Trustee

Namba Construction - Home Builder
Accountants for the Trustee

Executive Air Services - Private Airport Services
Accountants for the Trustee

American Resource Management Company - Oil and Gas Production Company
Accountants for the Trustee

## EDUCATION

- Master of Business Administration, University of Utah, 1977
- Bachelor of Science in Accounting, cum laude, University of Utah, 1977
- Bachelor of Science in Finance, cum laude, University of Utah, 1976

## PROFESSIONAL LICENSES AND MEMBERSHIPS

- Certified Public Accountant
- Utah Association of Certified Public Accountant
- American Institute of Certified Public Accountant
- Rocky Mountain Petroleum Accountants's Society

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Statement of

**STEVEN D. FERNLUND**
President, Twin Modal, Inc.

Representing the

**TRANSPORTATION BROKERS CONFERENCE
OF AMERICA**

Before the

**SUBCOMMITTEE ON SURFACE TRANSPORTATION
COMMITTEE ON
PUBLIC WORKS AND TRANSPORTATION
UNITED STATES HOUSE OF REPRESENTATIVES**

July 19, 1990

My name is Steven D. Fernlund. I am President of Twin Modal, Inc., and a licensed transportation broker in St. Paul, Minnesota. I am also a member of the Transportation Brokers Conference of America and for the past two years have served as Chairman of the Association's Legislative Committee.

Twin Modal, Inc. was founded in 1975 as a two man operation brokering freight from points in Minnesota to points throughout the United States. Today Twin Modal employs sixty people at offices in Minnesota, Nebraska, South Dakota, Illinois, Michigan, New Jersey and Georgia. We are now an employee-owned, full-service brokerage company that has enjoyed annual growth rates in excess of 20 percent since 1975. The bright future this portends is now clouded by eight separate undercharge claims totalling $236,000--six from bankrupt carriers and two from carriers who sold their assets and are attempting to recover additional monies for stockholders.

## THE TRANSPORTATION BROKERS CONFERENCE OF AMERICA

The Transportation Brokers Conference of America represents 1400 licensed transportation property brokers throughout the United States. Brokers serve shippers and carriers in much the same way that travel agents serve passengers traveling for business or pleasure. Brokers provide a wide variety of services related to motor truck, rail, and air transport. Brokers supply valuable information to shippers and carriers on price and service availability, arrange for the pickup and delivery of freight, and participate in scheduling, collection, billing, damage evaluation, and warehousing.

Before 1980, the regulatory climate severely restricted the services offered by transportation brokers. Before 1980, fewer than 100 transportation brokers participated in interstate commerce. Today there are over 6,000.

For the past decade the brokerage industry flourished because the Motor Carrier Act of 1980 freed transportation from a half-century of burdensome regulation. But the future of brokerage looks bleak as undercharge claims systematically drive brokers into bankruptcy. While brokers stand helpless, unscrupulous collection agencies engage in legalized theft by ferreting out technicalities in an antiquated law known as the filed-rate doctrine.

## THE FILED-RATE TIME BOMB

The typical undercharge scenario begins when a broker and a common carrier negotiate to move freight at a rate discounted from the carrier's filed rate. They come to terms and the carrier promises to file the negotiated rate with the Interstate Commerce Commission. Since it is not practical for the broker to wait several days (or weeks) for the Interstate Commerce Commission to verify that the carrier filed the negotiated rate, the freight moves, the broker pays the carrier and everyone is happy.

The law requires carriers to file their rates with the Interstate Commerce Commission. Carriers who willfully fail to file their rates may be imprisoned for two years and fined up to $20,000. Nonetheless, carriers routinely fail to file negotiated rates.

The scenario turns nasty when carriers go bankrupt and collection agencies begin poring over the bankrupt carriers' books. All too frequently the collection agencies are able to unearth hundreds of negotiated but unfiled rates. The filed-rate time bomb hits when the collection agencies gleefully present brokers with undercharge claims for the difference between the negotiated rates and the rates on file at the Interstate Commerce Commission.

Adding insult to injury, the recent Supreme Court's decision in Maislin *v* Primary Steel asserts that the law requires carriers to collect the undercharge even when the carriers willfully fail to file the negotiated rates. Brokers can't help but feel that the law is, in addition to being unfair, sanctioning negligence.

Strict adherence to the filed-rate doctrine would allow collection agencies to pirate over $200 million from brokers and shippers according to conservative estimates. This unjust, albeit legal, transfer becomes all the more absurd when we recognize that the only crime committed was the failure of the carrier to file the negotiated rates. Brokers committed no crime; they negotiated rates that were voluntarily agreed to by carriers. But for the carrier's crime the broker must pay the carrier the non-negotiated filed rate. This may be legal, but it's not fair.

UNDERCHARGES ARE NOT LIMITED TO BANKRUPT CARRIERS

Before the Supreme Court decision, the undercharge issue was limited to claims from bankrupt carriers. That is no longer the case: now nothing prevents a profitable carrier from billing undercharges. Although this is especially true if the business relationship between broker and carrier has terminated, brokers can also expect undercharges from carriers they are currently doing business with. Many carriers are confident that they can readily replace one broker with another; carriers looking for a source of quick cash are highly likely to stick their current brokers with undercharges and then find new brokers.

The Supreme Court's decision creates an incentive for profitable carriers to commit fraud. The following scenario is highly plausible: (1) a carrier solicits freight from a broker by offering a 50 percent discount from the filed rate, (2) the carrier deliberately and willfully fails to file the discounted rate at the Interstate Commerce Commission, (3) the carrier presents the broker with an undercharge claim for the full filed rate, (4) the carrier finds another broker to take advantage of.

Even more ominous is the potential for undercharges on freight moved under contract. The Transportation Brokers Conference of America encourages its members to do business with contract carriers rather than common carriers. A contract carrier transports property under exclusive agreements and the Interstate Commerce Commission exempts all motor contract carriers from the tariff-filing requirements. Since contract carriers are exempt from tariff regulations, the lawful rate is the rate specified in the contract. For years brokers signed written agreements with contract carriers to protect themselves from undercharge claims, and for years brokers slept peacefully. Today, these brokers are having nightmares. The Supreme Court's decision calls into question these contracts. Transportation attorneys are pointing out that contract rates can be ruled illegal if they do not make specific reference to the special needs being met and the special equipment being used. If the contracts are declared invalid, trucking companies holding both common and contract carrier authority will be able to collect undercharges (the difference between the contract rate and the rate on file under the company's common carrier authority).

The willingness of carriers to challenge the lawfulness of their own contracts is not merely something that may happen in the future--it's happening right now. Many carriers are taking a close look at their contracts hoping to find a technical flaw so that they can declare their contracts invalid and bill undercharges to brokers.

In virtually all of the claims filed against Twin Modal the carriers provided proof of liability and cargo insurance, copies of their contract carrier permits, and written contracts. But the attorneys for the auditors are alleging that the contracts are invalid and, therefore, subject to the much higher common carrier rates.

In one case involving Overland Express, I have a written contract and correspondence between Overland's Vice President of Marketing and myself acknowledging execution of the contract and providing names of individuals for our staff to use to obtain rates and service. When auditors for Overland challenged the contract, I petitioned the Interstate Commerce Commission. In response to my petition, Noreta R. McGee, Secretary of the Interstate Commerce Commission stated: "The contract between Rose and Twin is nothing more than a simple agreement to do business, setting forth various rights and responsibilities of each party. If it meets State law criteria, it is a valid contract." But the attorneys for the auditors allege that the transportation provided under these valid contracts is common, not contract carriage. The claims persist and legal fees mount.

## COMPETITIVE MARKETS OR ANTIQUATED REGULATIONS?

The Supreme Court's decision in Maislin v Primary Steel reveals the fundamental incompatibility between the filed-rate doctrine and the realities of today's marketplace. The two cannot coexist and members of this committee must make a choice: will you maintain antiquated regulations, or will you support free and competitive markets?

Passage of the Motor Carrier Act of 1980 signaled a new era in transportation and ended a half-century of protectionism. The Congress replaced an old, inefficient regime of bureaucratic regulation with a new market-oriented system characterized by price flexibility and free entry. The benefits of the new system have exceeded the expectations of even the most optimistic free-market advocates. The new competitive environment spawned innovation, reduced transportation costs, and saved consumers billions of dollars.

The benefits of the new system are now being threatened. The threat does not come from the Japanese or the Europeans. The threat comes from strict adherence to the filed-rate doctrine.

Nearly 100 years ago Congress required carriers to file rates to prevent discounting. In that bygone era, Congress was convinced that stability and equality of rates was more important to commercial interests than reduced rates. For years the Interstate Commerce Commission defended strict adherence to the filed-rate doctrine by arguing that it was "vital in our commercial life that there shall be one fixed and absolutely rigid rate governing the transportation at a given time of any given commodity between two given points."

Although brokers are amused by the well-intended but fallacious ideas of a bygone era, we are gratified that a variety of practices that previously would have been unlawful are now lawful. For example, under the old regime it was unlawful for a carrier to offer a discount to a shipper. Under the new competitive system brokers, shippers and carriers recognize that discounts are economically justified by cost differences. More important, offering a discount gives new carriers an opportunity to gain a foothold in the marketplace.

Transportation brokers are astonished by the Supreme Court's resurrection of the filed-rate doctrine. Congress made a fundamental policy choice in favor of deregulation when it passed the Motor Carrier Act in 1980. Overnight, the filed-rate doctrine became an anachronism. The Motor Carrier Act directs the Interstate Commerce Commission to promote competitive and efficient transportation services in order to meet the needs of shippers, receivers, passengers, and consumers, and allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public. In addition, the Motor Carrier Act directs the Interstate Commerce Commission to encourage the establishment of reasonable transportation rates without unfair or destructive competitive practices. Strict adherence to the filed-rate doctrine is incompatible with these directives.

The filed-rate doctrine is a bad law, and bad laws are the worst sort of injustice. Brokers can only hope that President Ulysses S. Grant was right when he stated, "I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution."

Nearly 100 years ago, Congress enacted the filed-rate doctrine to protect brokers, shippers and the consuming public. Today the filed-rate doctrine is being used by carriers and collection agencies to victimize brokers, shippers and the consuming public. Strict adherence to the filed-rate doctrine undermines the purpose of deregulation and produces absurd results. The only purpose served by strict adherence to the filed-rate doctrine is to provide windfalls for unscrupulous carriers and collection agencies.

The members of this distinguished Committee are mistaken if they imagine there is anything simple in tracking down or filing a negotiated rate with the Interstate Commerce Commission. The mechanics of the tariff-filing system are extremely complex and subject to a multitude of technical errors.

## CONGRESS CAN UNDO THE DAMAGE

The Court's majority recognized the need for congressional intervention to reconcile the conflict between the law and deregulation. Justice William J. Brennan wrote: "If strict adherence to Sections 10761 and 10762 (the tariff-filing requirements) as embodied in the filed-rate doctrine has become an anachronism in the wake of the Motor Carrier Act, it is the responsibility of Congress to modify or eliminate these sections." In a concurring opinion, Justice Antonin Scalia pointed out that the Motor Carrier Act plainly reflects an intent to deregulate. Justice Scalia then wrote: "perhaps deregulation cannot efficiently be accomplished within that framework, but that is Congress' choice and not the Commission's or ours."

We strongly urge Congress to reverse the Court's decision by writing new laws more compatible with the realities of the marketplace, to acknowledge the legitimacy and lawfulness of negotiated rates, and to relieve brokers from the strict obligation to pay filed rates. Moreover, we recommend that Congress grant the Interstate Commerce Commission the authority to afford such relief.

Specifically, the Transportation Brokers Conference of America urges Congress to pass legislation reversing the Maislin decision. We recommend the following statutory language:

> *Where tariff rates or charges are sought to be collected in addition to those originally billed and collected by a motor common carrier, the Commission may find the collection of such additional tariff rates and charges to be an unreasonable practice in violation of Section 10701 and that no additional tariff rates and charges can be collected. In instances where a civil suit is brought to collect rates or charges in addition to those originally billed and collected, such issues shall be referred to and be determined by the Commission under its primary jurisdiction and relief may be obtained under Section 11705(b)(3) of this subtitle.*

TWIN MODAL INC.

WRITTEN STATEMENT OF

TWIN MODAL, INC.

BEFORE

THE SUBCOMMITTEE ON SURFACE TRANSPORTATION

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

U.S. HOUSE OF REPRESENTATIVES

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The Motor Carrier Act of 1980 (MCA) significantly deregulated the interstate motor carrier industry. Entry restrictions were eased enhancing competition and the Interstate Commerce Commission (ICC) encouraged innovation in pricing and service options.

Estimates of the success of this partial deregulation of motor carriers include annual reductions of $60 billion in the nations distribution costs. Shippers and receivers of freight enjoy a large base of carriers offering competitive advantages in services and cost. JIT (Just in time) delivery programs, unheard of before 1980, have allowed American manufacturers to reduce inventory levels, enhancing their productivity and allowing them to compete globally while expanding domestic markets. A vibrant brokerage industry was born that brings the benefits of deregulation to even the smallest shippers. These small businesses enjoy reduced freight costs and improved services solely because of the brokerage industry.

During the past decade the ICC did not enforce some of the regulations that remained on the books following MCA. One of these was the Filed Rate Doctrine which is the subject of this hearing. Common carriers of less than truckload (LTL) freight obtained contract carrier authority from the ICC. These carriers, encouraged by the MCA and the ICC, offered discounts off of filed tariff rates either utilizing contracts or promises to file offered discounts in tariffs at the ICC. As a practical matter the shippers who accepted these discounts relied on the representations made by the carrier that the rates he would be billed, that he would pay, and that the carriers would accept payment on, were legal and lawful rates. Following the business failure of the carrier, auditors, working for the trustee in bankruptcy in most cases, found that the carrier did not properly file the discounts with the ICC or have a "valid" contract with the shipper in question. Balance due bills for the difference between the rates offered and collected and those properly on file at the ICC were issued.

Truckload carriers, many of whom were small businesses who entered the market after MCA, marketed themselves as contract carriers even though they held a common carrier certificate in addition to a contract carrier permit. With concerns about financing arrangements, the many safety regulations at the Federal and State levels, insurance cost and availability, driver recruitment and training, and the taxes imposed by each state they operated in, they found little if any need to make sure the contracts they entered into were written to the strict format provided by the ICC. Many of these carriers also incurred business failures for numerous reasons, all unrelated to rate levels. The freight bill auditors visiting the bills of these failed carriers noted the technical flaws in the written contract and have used these flaws to convert contract carriage to common carriage subject to the Filed Rate Doctrine. Even though the service was marketed, sold, and performed as contract carriage the auditors are making claims for much higher tariff rates, citing the technical flaws in the contract as the reason for this retroactive conversion of the agreement for providing contract carriage to common carriage.

The big lie in the Maislin decision is that the Filed Rate Doctrine prevents "rate discrimination" in the marketplace. No one needs to convince me that in the 19th century environment in which the doctrine was created it perhaps served that purpose. When I entered the freight business almost 20 years ago there was, in fact rate discrimination. The largest shippers were able to negotiate lower, specific commodity rates published in a carriers private tariff. Shippers in small communities were forced to pay higher than tariff rates through "arbitrary" charges published in tariffs. In today's environment of high speed data and voice communication, however, there is no need to have "filed" rates to protect a shipper, or class of shippers, or to protect the financial interest of a carrier serving smaller communities. With brokers serving the transportation needs of small to medium size shippers, and the brokers knowledge of market pricing for needed services, even the smallest of shippers is assured that they are paying competitive prices for competitive services. In fact, there is no evidence in any of the cases I have reviewed that any shipper received any unfair advantage over it's competitors by negotiating reduced freight rates.

Finally, we need to address the issue of inconsistent enforcement of the Filed Rate Doctrine. It is not the ICC, but independent freight bill auditors, their counsel, and trustees in bankruptcy who are trying to enforce it. If Maislin is allowed to stand, and this

Congress intends to keep the Filed Rate Doctrine, then give the ICC the resources needed to enforce it. By accepting less than the filed rate, carriers, and the shippers paying those rates, are in violation of the Elkins Act. Why has no one been prosecuted? And what of the auditors, their attorneys, and the trustees in bankruptcy who have settled some of these claims for less than the full amount. They too are in violation of the Filed Rate Doctrine and the Elkins Act. If Maislin stands than all of these should be prosecuted.

I think the practical implications of this suggestion demonstrate the absurdity of the Filed Rate Doctrine in the transportation marketplace today.

Twin Modal, Inc. is a thriving, employee owned, ICC licensed property broker. Our company was founded in 1975 and served 1,525 clients during our most recent fiscal year from offices in seven states. Utilizing contract motor carriers for most of our services, we entered into written contracts with these carriers that were prepared and reviewed by legal counsel. These contracts are being challenged, not as valid contracts, but as valid ICC contract motor carrier contracts. If these challenges are successful and the Filed Rate Doctrine is imposed completely, our company faces potential claims of millions of dollars. Unable to afford these claims we will have to cease operations. More than sixty employees will face unemployment and loss of their retirement benefits in our Employee Stock Ownership Plan. The Filed Rate Doctrine may be the law, may in fact be the core of the Interstate Commerce Act, but imposed in these cases, is certainly unfair to the clients of Twin Modal, its employees and their families.

In my opinion it was Congress' intent to create an open, competitive marketplace in transportation. Congress recognized that we are in a global market. For American manufacturers to compete successfully they require a transportation industry that is flexible in pricing and service options. Since MCA American businesses have enjoyed just such an industry.

With the Maislin decision the Supreme Court clearly pointed out that the Filed Rate Doctrine is inconsistent with the intent of Congress in 1980. I agree.

Through immediate legislation upholding the Negotiated Rates Doctrine adopted by the ICC, overturning the Maislin decision, Congress can send a clear message to the transportation industry. The message is that this country will remain competitive in the global market place because of a healthy, competitive trucking industry that is not burdened with the need to file freight rates before moving a shippers goods.

I urge you to enact such legislation now.

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
SURFACE TRANSPORTATION SUBCOMMITTEE
OF THE
PUBLIC WORKS AND TRANSPORTATION COMMITTEE

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# HEARINGS ON THE FILED RATE DOCTRINE AND NEGOTIATED RATES CASES

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## TESTIMONY OF THE REGULAR COMMON CARRIER CONFERENCE

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JULY 19, 1990

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
SURFACE TRANSPORTATION SUBCOMMITTEE
OF THE
PUBLIC WORKS AND TRANSPORTATION COMMITTEE

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HEARINGS ON
THE FILED RATE DOCTRINE
AND
NEGOTIATED RATES CASES

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TESTIMONY OF THE
REGULAR COMMON CARRIER CONFERENCE

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## I. INTRODUCTION

I appreciate this opportunity to testify on behalf of the Regular Common Carrier Conference (RCCC), a national trade association representing for-hire, less-than-truckload motor carriers of general freight. These interstate trucking companies are regulated by the Interstate Commerce Commission and must comply with the tariff filing and rate regulation provisions of the Interstate Commerce Act. Consequently, the RCCC motor carriers have a significant interest in tariff filing requirements and an appreciation for the problem of negotiated, but unfiled, rates.

## II. EXECUTIVE SUMMARY

In this testimony, the RCCC will focus on three major issues. First, the filed rate doctrine must be continued. The tariff filing requirement benefits both carriers and shippers by providing certainty that the rate on file will be charged and paid. The tariff or rate filing requirement is the cornerstone of the Interstate Commerce Act. It allows the ICC, shippers, and carriers to ensure that rates are reasonable, nondiscriminatory, and fair. Rate publication also promotes competition by disseminating price information which is important in an industry as large and diverse as trucking. Tariff rates are used to settle disputes between carriers and shippers about the proper rate. The tariff filing requirement is even more important today given the voluminous rate changes made daily in the trucking industry. Consequently, it is essential for Congress to admonish the ICC that the integrity of the tariff filing and rate regulation system must be preserved.

Second, the recent Supreme Court decision invalidated the Commission's policy on negotiated rates. The Court stated unequivocally that the agency lacks the authority to declare it to be an unreasonable practice for a carrier to collect the tariff rate when it negotiated with a shipper, but did not file, another rate. The decision has the immediate impact of exposing some shippers to undercharge claims from collection agencies representing bankrupt carriers. This is unfair and unfortunate. Legislation is necessary to give the ICC authority for a limited time period to provide relief to these shippers. However, it is important to understand that the negotiated rates problem is the unfortunate result of permissive rate and tariff compliance invited and fostered by former ICC Chairman Gradison. Those shippers, which are now being trapped by the Commission's past actions, should be afforded relief. But, the Supreme Court decision has now put everyone on notice of the continued necessity of filed rates. Confidential rates that promote discrimination and abuses are not permissible; indeed, they have been unlawful for over fifty years. Therefore, the ICC only needs short-term authority to remedy this transitory problem.

Finally, legislation is necessary to address several aspects of motor carrier rate regulation and tariff compliance. They are similar, in principle, to the three provisions embodied in H.R. 3243. The negotiated rates problem can and should be cleaned up by giving the ICC the authority to review negotiated rate claims arising from shipments that occur up to 18 months after enactment of legislation. The ICC should be authorized to grant relief to shippers when appropriate.

The statute of limitations for overcharge and undercharge claims should also be reduced from three years to 18 months within one year of enactment of this legislation. This will reduce shippers' exposure to negotiated rate claims in the future. It will also reduce administrative costs for carriers and shippers associated with the processing and verification of stale claims. The three year statute of limitations is an anachronism.

Furthermore, legislation should provide a mechanism by which carriers and shippers can jointly correct, with ICC approval, inadvertent tariff errors without exposure to civil and criminal penalties under the Elkins Act. Tariff errors do occur and a mechanism is necessary to correct them. The ICC currently has a procedure to waive undercharges for railroads. Motor carriers need similar authority.

## III. STATEMENT OF POSITION

The LTL carrier industry favors a legislative solution to the problem for shippers and carriers related to negotiated, but unfiled, rates. This situation was spawned by a renegade ICC under former Chairperson Gradison and now has to be brought to Congress for a remedy as a result of the Supreme Court's clear restatement of the law requiring filed rates.

It is indeed unfortunate this has happened at all. Had the ICC properly discharged its duties under the law, we would not have this problem today. Prior to the Gradison term, there was not a problem with carrier rates not being filed. We do not see unfiled rates at the state level where the regulatory agencies follow their legislatures mandate to monitor tariff filings and rates. Hopefully, those entrusted to administer the Interstate Commerce Act will not burden carriers, shippers, and the Congress with future administrative violations of the law.

As a starting point, the ICC should take immediate action to restore the integrity of the tariff filing system. All filed rates must be clear and concise. Tariffs containing a range of discounts and special customer codes must be eliminated since their secrecy violates the fundamental principle of public rates known to all parties. Such tariffs can encourage discriminatory, unfair pricing contrary to the dictates of the statute.

In addition, the ICC should act upon the RCCC petition to prohibit the payment of rate discounts to parties who are not paying for the transportation. Such arrangements deceive and unfairly burden the customer who is actually paying for the transportation. This is an unethical, unreasonable business practice which undermines the integrity of the tariff filing system.

The Supreme Court has made plain those elements of the law relating to tariffs and the carriers' rates.

1. The statute is designed to promote competition, while requiring the ICC to ensure that the rates are reasonable and not discriminatory.
2. The public filing of rates with the ICC is the method chosen to facilitate these goals.
3. These rates must be open to the public; there can be no secret rates. The tariffs must be understandable, and the rates contained in such tariffs must be charged.

If the ICC enforces the law, as interpreted by the Supreme Court, there will be no future problems of the nature now being faced by the shipper community. The Supreme Court has given a clear signal to shippers and carriers that for now and the future, they had better make certain that the rates agreed upon to transport their freight are properly in tariffs on file with the Commission. That will preclude any recurrence of the past practice of negotiated, but unfiled, rates. Consequently, the ICC needs, and should only be given, the authority for a limited period of time to grant relief to shippers now confronting these undercharge claims. We believe that giving the ICC the authority to adjudicate negotiated rate claims arising from shipments that occur up to 18 months after enactment of legislation is a more than adequate time to remedy the situation.

This Supreme Court decision has accelerated the process of carrier and shipper compliance that began several years ago when the negotiated rates situation received notoriety. Shippers are now contacting their carriers and insisting on proper tariff filing. They are verifying that the terms upon which they have agreed are put in a legally filed tariff.

In short, adherence to the law will preclude future incidents of claims against shippers based on filed rates, because shippers will ensure that carriers will file those rates before they use their transportation services. If there are any claims, they will be legitimate ones based on the legal tariff, which is how it should be.

Our proposal also contains a provision for carriers and shippers to jointly correct, subject to ICC review, inadvertent tariff errors. This is to cover those circumstances where a carrier had made a bona fide error in tariff publication and waives the collection of additional charges which would result from that error. In light of the fact that there are publication errors, this is a reasonable way to correct them for past shipments. The railroads already have such a mechanism at the ICC.

Lastly, our proposal would reduce the current statute of limitations from three years to two years and then 18 months a year after enactment. These are more reasonable time frames for the filing of overcharge or undercharge claims today where carriers rate and bill millions of shipments daily.

Respectfully submitted,

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July 19, 1990

**BEFORE THE**
**U. S. HOUSE OF REPRESENTATIVES**
**COMMITTEE ON PUBLIC**
**WORKS AND TRANSPORTATION**

Hearing on H.R. 3243 and Negotiated Rates Cases
July 19, 1990

Testimony of Thomas M. Moore

On Behalf of
National Small Shipments Traffic Conference
The Health and Personal Care Distribution Conference

My name is Thomas M. Moore, and I am submitting this testimony on behalf of two associations of shippers, the National Small Shipments Traffic Conference (NASSTRAC) and The Health and Personal Care Distribution Conference. I am President of NASSTRAC and authorized to testify for The Health and Personal Care Distribution Conference.

There are over 300 shipper-members of these two Conferences. Their members ship the majority of their freight in small shipment or LTL quantities via regulated motor common carriers. Our memberships include many of the major customers of the trucking industry, as well as smaller companies.

This hearing is to address the most important menace facing our members today: collection agents for bankrupt motor carriers who resurrect freight bills up to five years old and go through the tariffs with a fine tooth comb to try to find some excuse to raise the rates and create undercharges. These undercharge claims are presented on an unlimited variety of theories, including rates that were negotiated for the particular shipper's traffic but not filed by the carrier for whatever reason; rates that were not filed promptly, so as to miss the first several months of shipments; rates that were published in a tariff and charged in the original bills but allegedly are defeated by some technical rule found in some other tariff; rates that were actually published but included an ambiguous or defective description in the tariff of the commodities shipped; publication of the wrong origin or destination point or failure to include the entire commercial zone of a large city, etc.

The variety of tariff "reasons" for the undercharge claims is limited only by the broad imagination of the individual collection agent/auditor. While the claims all have in common that the collection agent is attempting to renege or go back on the rates which were understood to apply prior to the shipment and were actually charged on the freight bill, it is important to note that in most instances the agreed rates were actually published in the tariff, but the collection agent is claiming some technicality to defeat the collected rates.

This is not a matter of trying to bail out a few shippers making secret rates or under the table deals which they were trying to hide by not publishing the rates in tariffs. This is rather an assault by the collection agents against all shippers, using every tariff gimmick in the book to create asserted undercharge claims and separate shippers from huge sums of money. It is believed that, by this time, every one of our members has probably been confronted with bills for undercharges. The "filed rate doctrine" is being misused as a wedge to collect high rates which were never intended to apply to these shipments and at which the shippers would never have tendered their traffic, as they had rates comparable to those originally charged which were available via other carriers. It is quite common for the rates claimed to be double the rates originally paid.

The magnitude of currently filed undercharge claims has been estimated at $200 million. If the undercharge campaign is left unchecked, that bill could rise to $1 billion within the next two years.

### Significance of the Supreme Court's Maislin Decision

At a time when the industrial sector of the nation is swamped with undercharge claims, the Supreme Court has come forward with its Maislin decision. In the face of decisions from the Circuit Courts (with only one exception) supporting the Commission's attempt to protect shippers from being exploited under the guise of the filed rate doctrine, the Maislin decision has created renewed vulnerability for the shipping public to these questionable claims.

In the face of a dramatically changed rate and tariff world, the Supreme Court opted to overrule the Commission on the basis of old precedents whose validity was appropriate to the era when they were decided. Those decisions were reached at a time when there were only a limited number of tariffs and shippers generally shipped at uniform rates made in rate bureaus. Today the rates are set by the market, as each shipper negotiates with the carrier for rates reflecting the characteristics of its own traffic. Thus, rather than preventing "discrimination", by refusing to allow the shipper its agreed rates, the Supreme Court has licensed a discrimination against a shipper where the carrier neglected to publish or inartfully published its rates. The beneficiaries of the Maislin decision are not, as assumed by the Court, the other shippers, as they each have their particular negotiated rates, but rather the collection agents who keep most of this money.

The Maislin opinion can, and we believe should, be read as applying only in situations where the rates originally collected were not published. But the practical effect goes far beyond that and could impact every undercharge case filed by the collection agents. The complaints filed by the collection agents cite the filed rate sections of the Interstate Commerce Act and simply allege that the filed rate was not collected. Regardless of whether the real issue in a case is an unpublished/negotiated rate or the more common bases for the undercharge claims, viz., tariff ambiguities, rules in other tariffs which operate to take away the rates, tariff publishing errors, etc., the collection agents argue that the issue is governed by the filed rate doctrine and that Maislin dictates the shipper must lose the case. Thus, the collection agents are now armed with a precedent which they are using broadly to preclude the shippers from having the cases referred to the Commission for its primary jurisdiction to determine whether there are unreasonable practices, unreasonable tariff rules, tariff ambiguities, and/or unreasonable rates.

Nor is that the limit of the mischief created by Maislin. The collection agents are further arguing that, even if the court should find that there is an issue of tariff interpretation or unreasonableness to be referred to the Commission, the shipper must first pay the rates sought in the court complaint and then go before the Commission for reparations. That, they would argue, is the Congressional intent, even though it would mean that the shipper would have to pay the collection agent real dollars up front and then, if successful before the Commission, be relegated to the status of an unsecured creditor of the bankrupt carrier, with the prospect of ten cents on the dollar.

## Proposed Revision of H.R. 3243

These Conferences, together with other shipper groups and the leading trucking industry groups, were instrumental in the development of H.R. 3243. Since the Maislin opinion, we have again worked in coordination with those groups to develop a revised bill which is believed to have common support. The proposed revised bill is attached to my testimony.

H.R. 3243, as originally drafted, was designed to make it clear that the courts should refer the issues raised as to unreasonable practices to the Commission. But the Supreme Court has now seen fit to declare that Congressional intent, which it finds in the filed rate sections of the Interstate Commerce Act, is that the Commission may not find that the carriers failure to file an agreed or negotiated rate is an unreasonable practice. The revised language in the proposed bill makes it clear, not only that such issues should be referred to the Commission, but that the Commission has the power to declare the failure to file agreed or negotiated rates to be an unreasonable practice. And the bill would provide that the Commission may sanction such agreed or negotiated rates as the rates which should prevail. As a safeguard, the revised bill requires that the several circumstances found to constitute an unreasonable practice in Negotiated Rates II are prerequisites to determining an unreasonable practice.

The revised bill also makes it clear that the Commission may not only find a failure to file the "rates" to be an unreasonable practice, but that the use of tariff rules, classifications or other practices to defeat the negotiated rates which were filed may also be found to be an unreasonable practice. Such relief is also necessary because, as mentioned above, there are more cases in this category than of actual failures to file the "rates" themselves.

As did H.R. 3243, this proposed revision of that bill would provide that it applies to pending cases and outstanding claims, as well as future claims. Otherwise, the collection agents would be able to take the outstanding $200 million which they claim from the shippers. Finally, the revised bill would provide for an expiration date for the new statute, subject to reenactment or revision by Congress after a review of the ensuing events. It may be that broader legislation will be required in the future. But, for now, in view of the emergency nature of the situation, it is requested that Congress pass this urgently needed bill immediately. This is particularly apt because the collection agents are redoubling their collection activities since the Maislin opinion.

# DRAFT BILL

To amend title 49, United States Code, regarding the collection of overpayments of undercharges on shipments via motor common carriers of property and nonhousehold goods freight forwarders, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.*

## SECTION 1. PROCEDURE FOR GRANTING RELIEF FOR NEGOTIATED TRANSPORTATION RATES.

Section 11705(b) of title 49, United States Code, is amended by adding at the end thereof the following:

"(4) (a) Except as to household goods motor carriers, where tariff rates or charges are sought to be collected in addition to those originally billed and collected by a common carrier providing transportation subject to the jurisdiction of the Commission under Subchapter II of Chapter 105 of this title, or by a nonhousehold goods freight forwarder, the Commission may find the collection of such additional tariff rates and charges, or the imposition of tariff rules, or classifications relating thereto, to be an unreasonable practice in violation of section 10701. The Commission may exercise this authority only in circumstances where it finds 1) a person has negotiated transportation rates with the carrier other than those legally on file with the Commission; 2) the person tendered freight to the carrier in reasonable reliance upon the negotiated transportation rates; 3) the carrier failed to file with the Commission the tariff providing for such transportation rates; 4) the negotiated transportation rates were billed and collected by the carrier; 5) the carrier demands additional payment of higher rates filed in tariffs; and 6) the Commission determines that a grant of relief to the person would not authorize an intentional violation of the anti-rebating provisions of this subtitle nor result in unreasonable discrimination. In instances where a civil action is brought to collect tariff rates or charges in addition to those originally billed and collected, the reasonableness of such practices shall be referred to and be determined by the Commission under its primary jurisdiction, the action may be stayed pending that determination, and relief may be granted as provided above under Section 11705(b)(3).

(b) Nothing in this subsection shall relieve the motor carrier of the duty to file and adhere to its rates, rules, and classifications as required in sections 10761 and 17062, but relief may be granted as authorized in subsection (a) hereof."

## SEC. 2. STATUTE OF LIMITATIONS.

(a) MOTOR CARRIER CHARGES.--Section 11706(a) of title 49, United States Code, is amended by striking the period at the end thereof and inserting the following: "*Provided, however,* That a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title must begin within 24 months after the claim accrues a civil action to recover charges for transportation or service which is provided by the carrier on or after the date of the enactment of this proviso: *Provided, however,* That for transportation taking place on or after 1 year following such date of enactment, such civil actions must be filed within 18 months after the claim accrues."

(b) MOTOR CARRIER OVERCHARGES.--Section 11706(b) is amended by striking the period at the end of the first sentence and inserting the following: "*Provided, however*, That a person must begin within 24 months after the claim accrues a civil action to recover overcharges from a carrier subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title for transportation taking place on or after the date of the enactment of this proviso: *Provided, however*, That for transportation taking place on or after 1 year from such date of enactment, such civil actions must be filed within 18 months after the claim accrues."

(c) CONFORMING AMENDMENT.--Section 11706(d) is amended by striking "3-year period" in each instance where it appears and substituting "limitations period" in lieu thereof.

## SEC. 3. TARIFF RECONCILIATION RULES FOR MOTOR COMMON CARRIERS OF PROPERTY.

(a) IN GENERAL.--Chapter 117 of title 49, United States Code, is amended by adding at the end thereof the following new section:

### "§11712. Tariff reconciliation rules for motor common carriers of property

"(a) Subject to Commission review and approval, motor carriers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and shippers may resolve, by mutual consent, overcharge and undercharge claims resulting from billing errors or incorrect tariff provisions arising from the inadvertent failure to properly and timely file and maintain agreed upon rates, rules, or classifications in compliance with sections 10761 and 10762 of this title. Resolution of such claims among the parties shall not subject any party to the penalties of sections 11901, 11902, 11903, 11904, and 11914 of this title.

"(b) Nothing in this section shall relieve the motor carrier of the duty to file and adhere to its rates, rules, and classifications as required in sections 10761 and 10762, except as provided in subsection (a) hereof.

"(c) The Commission shall, within 90 days after the date of the enactment of this section, institute a proceeding to establish rules pursuant to which the tariff requirements of sections 10761 and 10762 of this title shall not apply under circumstances described in subsection (a) of this section.".

(d) CONFORMING AMENDMENT.--The analysis for chapter 117 of such title is amended by adding at the end thereof the following:

"11712. Tariff reconciliation rules for motor common carriers of property.".

## SEC. 4. EFFECTIVE DATE.

(a) GENERAL RULE.--Except as provided in subsection (b), the provisions of this Act (including the amendments made by this Act) shall take effect on the date of the enactment of this Act.

(b) APPLICABILITY OF SECTION 1.--The authority of the Commission under Section 1 shall extend to all claims filed on, or pending as of, the date of enactment of this Act and to claims arising from transportation shipments tendered up to 18 months after enactment. Unless the Congress determines a continuing need for Section 1 of this Act and enacts additional legislation, Section 1 shall expire 18 months after enactment.

The Commission shall submit a report to Congress within one year following enactment of this Act regarding whether there exists a justification for continuance of Section 1 of this Act.

# TESTIMONY OF EDWARD J. PHILBIN, CHAIRMAN
INTERSTATE COMMERCE COMMISSION
BEFORE THE HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
SUBCOMMITTEE ON SURFACE TRANSPORTATION
JULY 19, 1990

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to present the views of the Interstate Commerce Commission (ICC) concerning negotiated rates for interstate shipments via motor common carriers of property. The June 21, 1990 decision of the U.S. Supreme Court in Maislin Industries, U.S. Inc. v. Primary Steel, Inc., 110 Sup. Ct. 884 (1990) has focused considerable attention on this issue. That decision struck down the Commission's policy of relieving shippers of the obligation to pay filed tariff rates where carriers had failed to file lower tariffs reflecting the rates negotiated with, billed to, and paid by the shippers. While the Supreme Court has thus addressed the lawfulness of the Commission's decision, the Commission continues to believe that the equities of this situation clearly favor shippers. The Commission is therefore supportive of a legislative remedy for the problems faced by the shipping community in the wake of Maislin, and stands ready to provide whatever support is needed to assist the subcommittee in deliberations on these issues. In this regard, we recommend several changes, described below, to the text of the bill to make it clear that the Commission would have jurisdiction to determine that application of tariff rates or charges is unlawful where the Commission finds that the carrier has engaged in an unreasonable practice by attempting to collect rates in addition to those originally billed and collected.

**Background**

The statutory and regulatory framework of the negotiated rates issue is straightforward. Motor common carriers are required by 49 U.S.C. 10761 to file tariffs setting forth charges for all transportation services and to collect only the published tariff rates.[1] The Interstate Commerce Act (Act) also contains a requirement (49 U.S.C. 10701) that carriers' practices be reasonable.

Prior to 1980, the tariff-filing requirement of Section 10761 was applied strictly. In a series of cases decided under the Interstate Commerce Act in the early part of this century, the Supreme Court developed principles that later became known as the "filed rate" doctrine. That precept dictates that when a carrier files an action in court seeking to recover unpaid tariff charges, the court may not entertain any defense based on the carrier's misquotation of the tariff rate or the shipper's ignorance of that rate. A primary purpose of the filed rate doctrine, as enunciated by the Court, was reinforcement of the statutory prohibition against rate discrimination.

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[1] As discussed below, contract rates are an exception to this requirement.

The 1980 enactment of the Motor Carrier Act, Pub. L. No. 96-296 (MCA) substantially revised the transportation policy of the United States by encouraging a more competitive environment in the motor carrier industry. The ICC was directed, in regulating motor carriers, to promote competitive and efficient transportation services in order to "(A) meet the needs of shippers ... [and] (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and travelling public." 49 U.S.C. 10101(a)(2). The MCA significantly relaxed restrictions on entry into the motor carrier industry, and permitted carriers to operate as both common carriers and contract carriers, thereby enabling carriers to tailor rates to meet the needs of individual shippers. In this atmosphere of eased entry vigorous price competition ensued. The Commission responded by changing its tariff regulations to permit rate reductions on one day's notice and to allow carriers to establish rates for named shippers.

As a consequence of these changes, it is common practice today for carriers and shippers to negotiate the rates charged for particular transportation services. Typically, carriers and shippers will agree upon a rate and other pertinent terms and conditions, the shipper will tender freight to the carrier in reliance upon the agreed terms, and the carrier will then bill the shipper and receive payment at the negotiated rate. Until recently, the shippers generally assumed, or in some cases were expressly told, that the carriers would incorporate the negotiated rates in tariffs that would be properly filed with the ICC as required by statute.

Some motor common carriers, however, did not always comply with the statutory tariff filing requirements. As long as the carrier remained a going concern, these derelictions generally went unnoticed. However, when a carrier filed for bankruptcy, the receiver or trustee frequently retained an auditor to search the records of the carrier for instances in which the rates billed and collected were lower than the applicable rates on file at the ICC. When these discrepancies were discovered, the receiver or trustee then filed a collection action to recover the difference from the unsuspecting shipper. Rising numbers of motor carrier bankruptcies in recent years (as well as multiple claims attributable to individual carriers) increased significantly the number of collection actions.

As these actions to recover unpaid tariff charges on behalf of bankrupt carriers became more common, shippers requested that the ICC address the problem. In response, the ICC adopted a policy statement, Negotiated Rates I,[2] designed to address the practice of carrier failure to file negotiated rates. In that statement, the Commission indicated its intention to accommodate the traditional antidiscrimination goals of the Act with

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[2] *National Industrial Transportation League - Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986).

Congress' emphasis (in the MCA) on competition and the marketplace consequences that competition had engendered. Although the filed rate doctrine prohibited courts from considering equitable defenses to carrier undercharge actions, the Commission concluded that the doctrine did not preclude the ICC from exercising its regulatory power[3] to ensure that carrier billing practices are reasonable. The Commission reiterated the duty of carriers to charge the tariff rate, but explained that an inflexible policy of enforcing the filed rate when a carrier had negotiated a lower rate with a shipper, but had failed to file that rate in a tariff, would frustrate the intent of the Congress (as expressed in the national transportation policy, 49 U.S.C. 10101) to encourage pricing innovation, since it could chill rate negotiation between shippers and carriers and inhibit legitimate pricing initiatives. The Commission announced that in carrier actions to collect unpaid tariff charges, it would conduct an advisory analysis on referral from a court, to determine whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice, and, if a negotiated rate were found to exist, whether this amount was all the carrier should be permitted to collect.

Some federal district courts viewed the Negotiated Rates I policy statement as simply offering to render a non-binding advisory analysis on the issues, and concluded that referral of cases to the Commission would be incompatible with the filed rate doctrine. To clarify its policy (and in response to a petition from a shipper association), the Commission issued a second statement on the issue (Negotiated Rates II).[4] That statement reaffirmed that the ICC's source of authority for its negotiated rates policy was the statutory requirement that a carrier's practices must be reasonable.

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[3] Under 49 U.S.C. 10701(a) and 10704(b)(1).

### The Maislin Opinion

In the Maislin case, a division of Maislin Industries, U.S., operating as an ICC-licensed carrier, made 1,081 shipments of steel for Primary Steel, Inc. (Primary). Primary negotiated rates with Maislin for this transportation, and Primary understood that Maislin would file the negotiated rates in tariffs with the ICC. Despite that understanding, Maislin failed to file the negotiated rates in proper tariffs. Following Maislin's bankruptcy, an auditor appointed by the bankruptcy court claimed that Maislin's actual filed tariff rates were higher than the rates charged to Primary. Maislin brought suit in federal district court to recover $187,923.36 in alleged undercharges.

The court referred the dispute to the Commission, which rejected Maislin's argument that an unreasonable-practice determination in the circumstances of this case would violate the filed rate doctrine. The Commission noted that "in today's more flexible pricing atmosphere, . . . penalizing a shipper for the mistakes of a carrier may be unnecessary to deter discrimination" and would "frustrate[] the intent of the national transportation policy to encourage pricing innovation." The Commission emphasized that it was "not abolishing the requirement [in 49 U.S.C. 10761] that carriers must continue to charge the tariff rate." Nevertheless, the Commission found that its "jurisdiction over unreasonable practices gives us discretion to find that the tariff rate filed by motor carriers need not and should not be applied in a particular case," explaining that it was authorized under 49 U.S.C. 10701(a) and 10704 "to consider all the circumstances surrounding an undercharge suit." The Commission found that Maislin's solicitation and billing practices were unreasonable, and that Primary should not be required to pay additional charges for the difference between the lower negotiated rates and the higher tariff rates.

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[4] *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989).

The district court granted summary judgment in favor of Primary, and the Court of Appeals for the Eighth Circuit affirmed. The Supreme Court granted certiorari, heard oral argument on April 16, 1990 and issued its opinion on June 21, 1990. The Court held that the Commission's negotiated rates policy is inconsistent with the Interstate Commerce Act and is therefore invalid. Justice Stevens and Chief Justice Rehnquist dissented.

The majority concluded that the Commission's justification for authorizing this departure from the filed tariff schedule was contrary to the language and structure of the statute as a whole and the requirements of the filed rate doctrine in particular. The Court stressed that the practice of applying rates different from those contained in tariffs permitted discrimination that the Act by its terms seeks to prevent.

The Court was unconcerned that a carrier that failed to file a tariff reflecting the lower negotiated rate could receive a windfall due to its omission. The Court stated that such equities were not relevant to application of the Act's requirement that transportation be provided only under tariff rates, and stressed that compliance with sections 10761 and 10762 was utterly central to administration of the Act.

The Court also rejected the Commission's argument that passage of the MCA justifies the Negotiated Rates policy. The Court recognized that there had been a marked relaxation of the regulatory scheme in existence prior to 1980. However, the Court interpreted the Negotiated Rates policy as being in direct conflict with the Act, and thus concluded that Negotiated Rates was invalid.

Justice Stevens' dissent (in which Justice Rehnquist joined) focused on the majority's "failure to appreciate the significance of the 'sea change' in the statutory scheme that. . . converted a regime of regulated monopoly pricing into a highly competitive market."[5] In the dissenters' view, the Commission had faithfully followed its statutory grant of authority. The dissent viewed the MCA's changes in the National Transportation Policy (49 U.S.C. 10101) as a reflection of changing legislative goals. It concluded that in the more competitive, less regulated environment under the MCA, "strict mechanical adherence to the filed rate doctrine produces absurd results and serves no social purpose."[6] The dissenters would also have given greater deference to the Commission's interpretation of its governing statute.

### Effect of the Maislin Decision

The Commission had 105 claims pending before it as of June 28, 1990, with a dollar value of over $4.8 million.[7] Of these, 41 are court-referred cases and 64 were filed directly with the Commission. Forty-five cases are being held in abeyance at the request of the parties, and the record has not yet closed in 31 cases. The balance are in some stage of preparation or in the voting process (which has now been suspended.) Of the 105 cases, at most 20 involve issues other than unreasonable practices. After Maislin, the Commission cannot apply an unreasonable practices theory to resolve the remaining 85 pending cases.

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[5] Dissent, slip op. at 1-2.

[6] Dissent, slip op. at 13.

[7] This figure is understated somewhat because it does not include claims for which the amount at issue is unclear.

Furthermore, these 85 cases represent only a fraction of the potential negotiated rates claims that could be brought. The Commission is not capable of identifying all potential claims (which may not yet have been brought in federal district court, or if brought, may not yet have been referred to the Commission.) However, the trade press estimates that the total universe of claims could total as much as $200,000,000.

The Supreme Court left open the possibility that the Commission could find that the tariff rate was unreasonable, and thereby preclude the carrier (or the bankruptcy trustee) from collecting the difference between the filed and the negotiated rate.[8] However, this approach may prove unworkable for several reasons. Since 1980, motor carrier industry rates have been disciplined through competition, not through regulatory standards. Thus, this approach seems inconsistent with the concerns expressed by Congress in enacting the Motor Carrier Act of 1980, which was intended to provide for less government regulation and to spur competition in both service and pricing.[9]

Practical considerations also mitigate against the rate reasonableness approach. Individual determinations of reasonableness would be required for each tariff rate in question; as a result, shippers would have to undergo the considerable expense of litigating each of these rates before the Commission.

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[8] The court specifically stated (Majority op. at 11 n.10): "The issue of the reasonableness of the tariff rate is open for exploration on remand."

[9] H.R. Rep. No. 96-1069, 96th Congress, 2d Sess. 2307 (1980).

In the Commission's view, the equities of this situation lie with the shippers, who thought they had entered into binding arrangements with carriers for transportation services but who are nonetheless, after Maislin, held strictly liable for any difference between the filed and the negotiated rate. However, as the Supreme Court noted, equitable defenses (i.e., those based on carriers' failure to file the negotiated rate) cannot be asserted in an action to recover on the basis of a filed rate.[10] For the reasons outlined above, the prospect of successful administrative or judicial proceedings to protect shippers' interests appears uncertain, and any such proceedings will be costly to the litigants. The Commission therefore recommends that remedial legislation be enacted as quickly as is feasible.

### Comments on H.R. 3243

The Commission supports the approach taken in H.R. 3243, which clarifies the existence of the Commission's primary jurisdiction to determine whether motor carrier and freight forwarder solicitation and billing practices are unreasonable, and therefore unlawful under the Act. The Commission's expression of support is not an endorsement of additional regulatory authority, or a suggestion that new policies be adopted. Rather, the Commission views this proposal as an additional expression of the goals emphasized in the Motor Carrier Act of 1980, which directed the Commission to promote competitive and efficient transportation services.

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[10] Majority, slip op. at 11.

As now drafted, H.R. 3243 does not affirmatively give the Commission authority to determine that collection of tariff rates would be unlawful, where the Commission finds that a carrier has engaged in an unreasonable practice by seeking to collect rates in addition to those originally billed and collected. In order for the bill to work a solution to the problems faced by the shipping community as a result of the Maislin decision, we recommend the following changes:

1) On line 3 of the bill, add the following new provision (and renumber subsequent provisions):

> "SECTION 1. AUTHORITY FOR COMMISSION TO MAKE DETERMINATIONS REGARDING UNREASONABLE PRACTICES.
>
> (a) Section 10761 of title 49, United States Code, is amended by adding a new subsection (c), to read as follows:
>
> Notwithstanding the provisions of subsection (a), the Commission may determine that application of the tariff rates or charges is unlawful where it finds that the carrier has engaged in an unreasonable practice in violation of Section 10701 of this subtitle.
>
> (b) Redesignate existing Section 10761(c) as 10761(d)."

2) On page 2, lines 5 and 6, delete the phrase "a person may assert" and add the phrase "the Commission may find, on application".

3) On page 2, line 9, place a period after the word "subtitle" and delete the remainder of that sentence.

4) On page 4, delete lines 9-14, and replace them with the following:

> "Except as provided in subsection (a) and Section 10761(c), motor carriers shall not be relieved of the duty to file rates, rules, and classifications as required in section 10761(a) and 10762."

Existing Section 1 would confirm the Commission's primary jurisdiction over allegations that retroactive collection of a tariff rate would be an unreasonable practice or otherwise violate the Act. This section of the bill covers the typical case in which a motor carrier initially bills and accepts payment at a negotiated rate that is not properly filed in a tariff, and later seeks payment of additional charges based on the actual filed tariff.

In addition to the typical case, Section 1 would cover tariff notation cases, such as Carriers Traffic Service, Inc. v. Anderson, Clayton & Co., 881 F.2d 475 (7th Cir. 1989) (whether shipper's failure to note on bill of lading that it loaded and counted the freight meant that a higher tariff rate applied). This section would also establish the Commission's primary jurisdiction over cases involving retroactive application of loss-of-discount provisions for failure to pay transportation charges within the time allowed by the Commission's credit regulations, e.g., ICC Docket No. MC-C-30135, Mennen Company v.

Campbell 66 Express, Inc.., (not printed), served September 6, 1989.

We note that Section 1 by its terms also covers allegations of statutory violations when a nonhousehold goods freight forwarder seeks to collect tariff-based rates or charges in addition to those originally billed and collected. The requirement that nonhousehold goods freight forwarders publish their rates in tariffs ended on December 21, 1986, the effective date of the Surface Freight Forwarder Deregulation Act of 1986, Pub. L. 99-251, 100 Stat. 2993. Therefore, we assume that the bill intends to require courts to refer such allegations only as to shipments delivered on or before December 20, 1986.

Section 2 would shorten the statute of limitations for civil actions filed by motor common carriers to recover undercharges, or by shippers to recover overcharges. We commend the shortening of the limitations period because it is evenhanded and should provide a faster resolution of claims concerning transportation charges.

Allowing motor carriers and shippers to resolve overcharge and undercharge claims by mutual consent, as provided in Section 3, is a useful tool. In cases where the parties agree that there has been either a billing error or a ministerial error in establishing the tariff, or that it would be unreasonable to charge the filed rate retroactively, the parties would be excused from the requirements of Section 10761 and 10762 to charge and pay only the filed rate. The provision for Commission review allows oversight to prevent this section from being used unlawfully to favor certain shippers over others.

Section 4 of the bill is helpful because it should foreclose litigation on whether the standards contained in H.R. 3243 should apply to existing cases. Because the bill does not apply to claims that have already been finally resolved, the word "retroact[ive]" is not an accurate description of the intent of this provision. We therefore recommend deletion of the word "retroactive" from the title of the subsection.[11]

Finally, we think it would be helpful for the legislative history of H.R. 3243 or any similar legislation to clearly state that its purpose is to overrule Maislin.[12] It would also be helpful for that history to indicate that the bill is meant to clarify existing law, rather than to make a substantive change.

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[11] In any event, the heading of Section 4(b) as introduced contains a typographical error (the word "retroaction" instead of "retroactive").

[12] We recommend that the committee report include the explicit statement that "This [legislation] is intended to overrule the decision of the Supreme Court in Maislin Industries, U.S. Inc. v. Primary Steel, Inc., 110 Sup. Ct. 884 (1990)."

## SEPARATE EXPRESSION OF COMMISSIONER LAMBOLEY, JOINED BY COMMISSIONER SIMMONS

Because of an evident pattern of conduct, we believe that the Commission acting on its own initiative, should commence enforcement-related investigations under Chapter 117, Title 49 of the U. S. Code, more specifically 49 U.S.C. § 10701, to determine whether and with what frequency, the carriers now in bankruptcy seeking to recover tariff-based charges, knowingly and willfully undertook to charge and receive compensation for transportation services other than the tariff-filed rates, in violation of 49 U.S.C. §§ 10761-10762, and if so, what are the appropriate civil or criminal sanctions to be applied under Chapter 119, Title 49 of the U.S.C.Code, more specifically 49 U.S.C. §§ 11903 11904, and 11914-16.

In addition, the Commission should notify the Bankruptcy Courts in each instance of the planned investigation of the bankrupt carrier.

In our view, this action represents an appropriate Commission supplemental initiative in light of the _Maislin_ decision.

*Statement of Ronald A. Sarasin, President*
*National Beer Wholesalers Association*

*Before the Subcommittee on Surface Transportation of the*
*House Committee on Public Works and Transportation*
*July 19, 1990*

*Mr. Chairman and members of the Subcommittee, thank you for providing time for me to register the support of beer wholesalers for enactment of H.R. 3243. We asked for this opportunity to testify because we believe many of our members' companies, while not having a unique story to relate, are a good collective example of how the "Catch 22" created by the motor carrier rate undercharge issue has had a potentially devastating impact on many small businesses.*

*The majority of the four-thousand beer wholesale companies in cities and towns throughout the country are small, family-owned and operated businesses. Transportation plays a very important role in the day-to-day conduct of their business, principally in the form of supply of product from regionally-sited breweries to beer wholesalers. More often than not, these shipments move in interstate commerce.*

*While the beer wholesaling business is transportation intensive, you could not describe management as being expert in all the nuances of transportation law and regulation. Terms such as unpaid tariff charges and filed rate doctrine are being heard by some beer wholesalers for the first time during motor carrier bankruptcy proceedings. Similarly, legal advisors to our member companies do not necessarily have expertise in transportation law. In other words, Mr. Chairman, our members may engage in* *substantial amounts of business with motor carriers, but it is entirely possible that their total knowledge of the changes made* *or not made* *by the Motor Carrier Act of 1980 amounted to zero until the rate undercharge cases rudely awakened them.*

*Beer wholesalers may not be experts in transportation law, but they know an injustice when they see one. Let me quote from a letter written by Pete Haralson, a beer wholesaler in LaGrange, Georgia, who was sued for $12,247.31 for past undercharges. Pete writes:*

> *". . .we have fought this suit for over two years, spent over $10,000 in legal fees, and countless hours of time because it just ain't right to pay these vultures. Everyone always states pay don't go to court; however, sometime you need to stand up for what is right."*

*Other beer wholesalers face much larger liability; for example, Ed Perry, a beer wholesaler in Augusta, Georgia, who dealt in good faith with his carrier but now is confronted with a bill of more than $100,000 for so-called undercharges. I have no doubt that beer wholesalers across the country face similar liabilities although they may not yet be aware of it.*

*Mr. Chairman, to give the Committee a better understanding of the problem, I would like to ask that a number of letters from Georgia beer wholesalers be printed as part of the hearing record.*

*Mr. Chairman and members of the Subcommittee, if, during your consideration of H.R. 3243, you are tempted to conclude that the mess created by rate undercharges is the result of haggling over price between scofflaw shippers and carriers, I hope you will counter this temptation by recollecting the beer wholesaler experience. I would like to use the balance of my time profiling several characteristics of brewer-wholesaler-motor carrier transportation arrangements which justify the type of relief provided by the bill.*

*1. Common v. Contract Carriage. The constant flow of traffic between brewers and wholesalers has resulted in utilization of all shipper carrier options. We have found that many of our members utilize contract and common carriage to meet their needs. Because wholesalers order truckload and less-than-truckload shipments, we are finding that, since 1980, our members may have utilized the same carrier for both common and contract carriage. Unaware of any pitfalls between the two options, a wholesaler asking for a contract rate with a similarly uninformed common carrier may have been told, "It's easier for me to bill you per one-hundred weight for the same price", thereby triggering shipper liability for rate undercharges.*

*2. Ghost Carriers/Real Liability. I repeat, it is incumbent upon the beer wholesaler to arrange for transportation of his shipments from the brewery. However, this does not mean that a shipment always moves by a carrier designated by the wholesaler. We are finding that, in the interest of efficiency and responsiveness to wholesaler orders, brewery shipping docks often* *consign shipments to the first available carrier. The brewery-selected carrier must agree to a rate specified in the original order. Thus, the wholesaler has incurred liability to a carrier he has never negotiated with and perhaps never heard of. Therefore, our member companies are unaware of the extent of liability they have incurred through their own activity, and are certainly unaware of potential liability incurred without their participation.*

*3. America's Warehouse. The for-hire trucking industry -common and contract carriage- has been termed "America's Warehouse on Wheels." Since the passage of the Motor Carrier Act in 1980, the "Warehouse" has been reinforced by computer applications, telecommunications enhancements and satellite tracking systems that have made common carriage even more important to small business inventory management. Beer wholesalers, who deal with food product inventories with a limited shelf life, rely on the entire "Warehouse on Wheels" -common and contract carriage- to serve their transportation and inventory management needs. To have access to one part of the system without the other, would certainly be turning back the clock. However, Mr. Chairman, as we sit here this morning, an older and smarter beer wholesaling industry (ten years older and made smarter by millions of dollars in claims) is spreading the word like wildfire: "Use contract carriage!" Only through contract carriage is the problem of rate undercharge liability avoided. This is a sad commentary, because common carriage has been responsive to the needs of our members. We are hopeful that the Committee will move legislation which redresses the wrong*

~~that~~ confronts our members who have incurred financial liability for rate undercharges and restores our confidence in the common carrier segment of our motor carrier transportation system.

Thank you for this opportunity to testify in support of H.R. 3243.

**General**
**Wholesale**
**Company**

1271 TACOMA DRIVE NORTHWEST, ATLANTA, GEORGIA 30318 404-351-3626 FAX: 404-351-2502

July 16, 1990

Mr. Ron Sarasin
President
5205 Leesburg Pike
Suite 1600
Falls Church, Virginia 22041

**Re: Interstate Commerce Act Legislation**

Dear Ron,

As you know, our company does a good deal of interstate shipping business by rail and motor carrier. I am writing to bring to your attention a recent development in this area, which has had a profound adverse effect on our company.

Our company conducted some shipments in 1983-1985 with a family-operated trucking company known as Claxton Transport, Inc. An officer of the company had contacted us and quoted a competitive shipping rate, and had then conducted the shipments, billed our company and was paid in full at the agreed rate. In December, 1985, Claxton Transport went bankrupt.

Thereafter, a Texas-based collection agency, Delta Traffic Service, apparently acquired from the bankruptcy trustee the rights to audit Claxton's freight bills and tariffs filed with the Interstate Commerce Commission and sue former customers on these shipments conducted by Claxton. Delta Traffic Service then sued our company for the alleged differences between the agreed shipping rate that was billed and paid and the tariff rate supposedly on file with the ICC.

We had done business in good faith with Claxton Transport, had relied on representations of Claxton's officers, and had paid our bills as invoiced on the shipments. Therefore, we certainly did not expect to be sued years later for thousands of dollars more by a collection company that had nothing to do with these transactions.

Our lawyers had the case referred to the ICC, which issued a decision that collection on the alleged undercharges on these shipments would constitute an unreasonable practice in violation of the Interstate Commerce Act. We then sought to have the court enforce this decision.

In the meantime, however, the United States Supreme Court issued a decision on June 21, 1990 addressing this issue. A copy of the decision is enclosed. Basically, the Court ruled that the ICC's decision was unenforceable. In doing so, the Court apparently overruled the decisions of the ICC and six out of seven federal courts of appeals across the country that had addressed thi
issue.

The Supreme Court held that the tariff rate had to be charged and collected no matter what the circumstances (unless the rate itself was declared unreasonable). This is known as the "filed rate doctrine." The Court apparently recognized that this doctrine has little applicability in today's deregulated market, but ruled that neither the courts nor the ICC could change this doctrine; only Congress could do that. Thus, the Supreme Court has left this problem at the feet of the Congress.

This problem of billing one rate and later collecting another one is apparently widespread across the country, totalling as much as $100 million to $200 million in claims. Many other companies are apparently in the same position as ours, and hopefully they will be contacting their Congressional representatives just as we have. In our case, the result of this decision is that our company has to pay twice and a collection agency gets a windfall. The windfall in this circumstance totals over $30,000.00. In our opinion, this is an unjust result and is not required to further any important policies under the Interstate Commerce Act. The federal agency charged with administration of the Act agrees with us.

I am writing to request and urge your assistance in following through on the Supreme Court's invitation and working toward Congressional action that will resolve this problem. A problem that could generate enough claims that it could threaten our position as an ongoing business and employer. I have been informed that hearings on this issue are about to be held in both the Senate and House of Representatives. I hope you will give this matter your serious consideration, and would like to discuss the matter with you further at your convenience.

Very truly yours,

Howard Young
Vice President
General Wholesale Company

Enclosure
EHY/gc

**Mid-Georgia Sales Company**

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Schaefer
Schaefer Light

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Caribbean Cooler White
Wild Punch
White Mountain Cooler

July 13, 1990

Mr. Ronald A. Sarasin
5205 Leesburg Pike
Suite 1600
Falls Church, Virginia 22041

Re: Interstate Commerce Act Legislation

Dear Ron:

I am thankful for you appearing before a Congressional Committee regarding the freight bills we incurred and paid Claxton Transport, Wrightsville, Georgia.

Claxton Transport unfortunately went bankrupt in 1985 and a collection agency named Delta Traffic Service bought their old freight bills and compared them to Claxton's posted tariff; then they sent us an invoice for the difference, amounting to some $30,000. We engaged the Atlanta law firm of Varner, Stephens, Wingfield, McIntyre and Humphries and the Macon law firm of Martin, Snow, Grant & Napier to represent us in this matter. To date we have paid legal fees in the amount of $10,784.00.

The Supreme Court ruled against us but said this is an inequity and should be corrected, but not by them but by Congress.

Mr. Claxton and I traded in good faith, we were both satisfied with our business relation over a period of years and that should have concluded the matter. And it did until this rapacious and vulturous collection agency got into the act. They have done nothing to deserve $30,000 from me plus interest in the amount of some $20,000.

I ask you to plead with Congress to retroactiviely correct this injustice.

Yours very truly
Mid-Georgia Sales Company

Phil J. Sheridan

Phil J. Sheridan
President

*Serving Middle Georgia for More Than A Quarter of A Century*

GUSTO BRANDS, INC.
707 Douglas Street • LaGrange, Georgia 30240 • 404/882-2573

JULY 13, 1990

Mr. Ron Sarasin
5205 Leesburg Pike, #1600
Falls Church, VA 22041

Attention: Ron Sarasin

We have been a beer distributing firm since 1941 and I am the third generation owner. In 1983 and 1984 we did business with Claxton Trucking Company hauling beer for us from Winston Salem, North Carolina to our warehouses in La Grange and Columbus, Georgia.

Carlton Claxton came to my office in 1983 to get me to change trucking firms. We just had some problems with our existing carrier so we were receptive to change. Moreover, he offered to carry our goods for the same flat rate of $400.00 per load, we were paying. It is 400 miles from Winston Salem to La Grange so in essence the rate was $1.00 per mile which was comparable to other rates; although Columbus was 40 miles from La Grange it was closer to Claxton terminal than La Grange so we agreed on the same fee.

The Claxton's were honest country folk. Sometimes I would have to loan their drivers money per the Claxton's instructions and deduct it off the next bill. Often when they picked up loads their equipment would not be big enought to haul a minimum of 44000 lbs. The Claxtons eventually went out of business.

In 1987 Delta Traffic Service files suit against us for 12247.31 plus interest calling it undercharges. This is a frivolous suit as these people never earned the money. I felt it was unjust and sought legal relief. The bult of the money was on our Columbus office which was 10% further at the most. The rate or tariff was 35% higher which is excessive.

In conclusion we have fought this suit for over two years, spent over $10,000 in legal fees, and countless hours of time because it just ain't right to pay these vultures. Everyone always states pay don't go to court; however sometime you need to stand up for what is right. Even the

Con't Page 2

**GUSTO BRANDS, INC.**
707 Douglas Street • LaGrange, Georgia 30240 • 404/882-2573

ICC ruled in our favor once. We fevently request that legislation be passed retroactively enforced to stop these type of unwarranted suits on published tariff rated and negotiated rates.

Sincerely,

Pete Haralson

Pete Haralson
President

PH/jw

Stroh's
Coors
MOLSON

SMOKEY SNIDER DISTRIBUTING COMPANY, INC.
517 PEACHTREE STREET EXT., P.O. BOX #36, VIDALIA, GEORGIA 30474
PHONE. 912 537-3950

July 13, 1990

NBWA
Ronald A. Sarasin, President
5205 Leesburg Pike Suite 1600
Falls Church, Virginia 22041

Dear Sir:

We are writing this letter in referrence to the suite against us, brought by Delta Traffic Service, Inc. which is assignee of Claxton Transport, Inc., in the amount of $22,526.71 plus interest and legal fees of Delta Traffic in this suit.

Smokey Snider Dist. Co., Inc. dealt with Claxton Transport, Inc. between about 1981 and 1985 on shipments of alcoholic beverages. Smokey Snider had previously shipped by railroad and had only recently begun shipping by motor carrier. Carlton Claxton, president of Claxton Transport contacted me by telephone four or five times saying he needed our shipping business and would appreciate the opportunity to do business with us. We were not interested at first, but circumstances changed and we decided to give him a try.

Carlton Claxton quoted me a rate of $.72 per hundred weight, plus 18% fuel surcharge, yeilding an effective rate of $.85 per hundred weight in shipping malt beverages between Winston-Salem, North Carolina and Vidalia, Georgia. We agreed to this quoted rate and it was confirmed in a letter dated September 11, 1981, a copy attached hereto. Thereafter, Claxton Transport made shipments of malt beverages between Stroh Brewery in Winston-Salem, N. C. and Smokey Snider Dist. Co. plant in Vidalia, Ga.. All shipments were at the quoted rate of $.85 per hundred weight.

All of Claxton's invoices to Smokey Snider Dist. Co. reflected the quoted and agreed shipping rate. Smokey Snider paid in full all of the invoiced amounts to Claxton Transport. Based on Carlton Claxton's representation at the time he quoted a rate, we had no reason to beleive that the President of Claxton Transport would quote a rate that could notbe legally charged. We were not aware of any failure by Claxton to comply with any applicable tarriffs. We would not have used Claxton Transport for any shipments in question if they had quoted the higher alleged tarriff rate of $1.16 per hundred weight, because we could get a better rate elsewhere.

Schlitz
ERLANGER
Old Milwaukee
SCHLITZ MALT LIQUOR
light

SMOKEY SNIDER DISTRIBUTING COMPANY, INC.
817 PEACHTREE STREET EXT., P.O. BOX 836, VIDALIA, GEORGIA 30474
PHONE. 912 537-3950

After 1985, Claxton went into bankrupsy and Delta Traffic took over Claxton's accounts and entered suit against Smokey Snider Dist. Co., as well as many other businesses in the same circumstances as ours. This case was carried before ICC and they ruled in our favor and five Appeals Courts as well ruled in our favor. Another similar case was appealed to the Supreme Court and they ruled against us.

This has been a very long drawn out situation and has been very expensive as well. There have been many thousands of dollars spent on legal fees as well as our time that has been involved. This has been a gross miscarriage of justice in all these cases and the ICC rule was never meant to be applied in such a manner as this. This has been and is nothing more or less than legal robbery in any sense.

We truly hope that something can be done in order to rectify this unjust situation retroactively and if not retroactively then make it impossible for some other innocent person or business from being robbed or swindled through our legal system.

Thanking you in advance for any assistance that you can supply through the Legislature or otherwise to help rectify this unjust and unfair situation.

Sincerely,

Preston T. Mosley
Preston T. Mosley
Treasurer

**DIXIE-RIVERSIDE, INC.**
P.O. Box 6326
2719 Old Savannah Road
Augusta, Georgia 30906
404-793-2723

July 13, 1990

Mr. Ron Sarasin
National Beer Wholesalers Association, Inc.
5205 Leesburg Pike, Suite 1600
Falls Church, Virginia 22041

JUL 17 1990

Dear Ron:

I have discussed with George Mead H.R. 3243 on several occasions on how important this piece of Legislation is to all Beer Wholesalers in the United States. As you know, the Supreme Court Ruling concerning undercharges on freight bills could impact every wholesaler. I'm one of five wholesalers in the State of Georgia that definitely felt the impact of this Supreme Court ruling. This ruling opens up the opportunity for all truckers in business today to rebill all Beer Distributors for past shipments.

I understand you will be testifying on July 19, 1990 in the House concerning H.R. 3234 and would like to make five points for your consideration as follows:

1. Please stress the importance that H.R. 3243 must address all undercharges since deregulation in 1980.
2. Claxton transport charged our company a competitive rate and other trucking companies would have been more than glad to ship at this competitive rate. These companies are still in business and are willing to testify on the above fact. Also, Mr. Claxton will testify that the rate he charged us was a competitive rate and that we do not owe anyone any additional money.
3. Presently we have undercharged billings of $62,555 and the collection agency has added $50,670 as interest which is calculated at 18%. Our total liability at $113,225 does not include attorneys fees of over $12,000 we have incurred to fight this problem and for us to have won our battle in State Court and ICC.
4. This problem has been estimated by some people as 100 to 200 million dollars in the United States for just bankrupt trucking companies. It could be in the billions if every company billed their customers.
5. I have attached my letter to my Congressman and Senators along with additional information from my attorneys for your consideration.

Your help in winning this battle in Congress is very important for the Beer Wholesalers of yesterday, today, and the future. Please contact me for any questions and again Thank you for your help.

Sincerely,

Ed

Edgar L. Perry
President

**DIXIE-RIVERSIDE, INC.**
P.O. Box 6326
2719 Old Savannah Road
Augusta, Georgia 30906
404-793-2723

July 12, 1990

Congressman Doug Barnard
2227 Rayburn House Office Building
Washington, DC 20515

Dear Doug:

As you know, our company does a good deal of interstate shipping business by rail and motor carrier. I am writing to bring to your attention a recent development in this area, which has had a profound adverse affect on our company.

Our company conducted some shipments in 1983-1985 with a family-operated trucking company known as Claxton Transport, Inc. An officer of the company had contacted us and quoted a competitive shipping rate, and had then conducted the shipments, billed our company and was paid in full at the agreed rate. In December, 1985, Claxton Transport went bankrupt.

Thereafter, a Texas-based collection agency, Delta Traffic Service, apparently acquired from the bankruptcy trustee the rights to audit Claxton's freight bills and tariffs filed with the Interstate Commerce Commission and sue former customers on these shipments conducted by Claxton. Delta Traffic Service then billed our company for the alleged difference between the agreed shipping rate that was billed and paid by Dixie-Riverside and the tariff rate supposedly on file with the ICC as per Claxton employees.

We had done business in good faith with Claxton Transport, had relied on the representations of Claxton's officers, and had paid our bills as invoiced on the shipments. THEREFORE, WE CERTAINLY DID NOT EXPECT TO BE SUED YEARS LATER FOR THOUSANDS OF DOLLARS MORE BY A COLLECTION COMPANY THAT HAD NOTHING TO DO WITH THESE TRANSACTIONS.

Our lawyers had the case referred to the ICC, which issued a decision that collection of the alleged undercharges on these shipments would constitute an unreasonable practice in violation of the Interstate Commerce Act. We then sought to have the court enforce this decision and was successful in Richmond County. On the 29th day after being successful in Richmond County, this collection agency appealed our case to the Georgia Court of Appeals and we have waited for the Supreme Court to rule.

In the meantime, however, the United States Supreme Court issued a decision on June 21, 1990 addressing this issue. A copy of the decision is enclosed. Basically, the court ruled that the ICC's decision was unenforceable. In doing so, the court apparently overruled the decisions of the ICC and six out of seven federal courts of appeals across the country that had addressed this issue.

Schlitz
Schlitz Malt Liquor
Schaefer
Stroh's
Pabst Blue Ribbon

The Supreme Court held that the tariff rate had to be charged and collected, no matter what the circumstances (unless the rate itself was declared unreasonable). This is known as the "filed rate doctrine." The court apparently recognized that this doctrine has little applicability in today's deregulated market, but ruled that neither the courts nor the ICC could change this doctrine; only CONGRESS could do that. Thus, the Supreme Court has left this problem at the feet of CONGRESS.

This problem of billing one rate and later collecting another one is apparently widespread across the country, totalling as much as $100 million to $200 million in claims. Many other companies are apparently in the same position as ours, and hopefully they will be contacting their congressional representatives just as we are. In our case, the result of this decision is that our company has to pay twice and a collection agency gets a windfall. In our opinion, this is an unjust result and is not required to further any important policies under the Interstate Commerce Act. The federal agency charged with administration of the Act agrees with us.

I am writing to request and urge your assistance in following through on the Supreme Court's invitation and working toward Congressional action that will resolve this problem. I have been informed that hearings on this issue are about to be held in both the Senate and House of Representatives concerning H.R. 3243 which as I understand if passed by Congress would solve my problem. I hope you will give this matter your serious consideration, and would like to discuss the matter with you further at your convenience. Please prevent Dixie-Riverside, Inc. from sending in excess of $100,000.00 to some collection agency in Texas that is picking through the bones of dead trucking companies in the United States.

Sincerely,

Edgar L. Perry
President

EP/alm

VARNER, STEPHENS, WINGFIELD & HUMPHRIES
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
ATTORNEYS AT LAW
SUITE 1700 RIVERWOOD
100 CUMBERLAND CIRCLE
ATLANTA, GEORGIA 30339

404 850-7000
FAX 404 850-7070

July 11, 1990

Mr. Edgar L. Perry
President
Dixie-Riverside, Inc.
P.O. Box 6326
2719 Old Savannah Road
Augusta, Georgia 30906

Re: Delta Traffic Service, Assignee of Claxton
Transport v. Dixie-Riverside, Inc.
Case No. 87-RCSC-453;
State Court of Richmond County, Georgia

Dear Mr. Perry:

I am writing to discuss the status of the above-referenced lawsuit in light of the recent United States Supreme Court decision in the case of Maislin Industries v. Primary Steel, 58 U.S.L.W. 4862 (June 21, 1990). A copy of the decision is enclosed.

As you know, the pending lawsuit is based on shipments conducted for your company in 1983-1985 by a now-defunct trucking company, Claxton Transport, Inc. Claxton's representative had contacted you and quoted a competitive shipping rate, to which you agreed. Claxton Transport then conducted the shipments, billed your company and was paid in full at the agreed rate.

In December, 1985, Claxton Transport went bankrupt. Delta Traffic Service, a Texas-based collection agency, subsequently acquired the right to audit Claxton's freight bills and tariffs filed with the Interstate Commerce Commission and sue former customers for amounts legally owed on these shipments. Delta Traffic Service thereafter sued your company (and other customers of Claxton Transport) based on the shipments that Claxton Transport had conducted for your company. The lawsuit was based on the alleged difference between the agreed shipping rate that was billed and paid on these shipments and the applicable tariff rate on file with the ICC.

You had done business in good faith with Claxton Transport, had relied on the representations of Claxton, and had paid your bills as invoiced on these shipments. Therefore, it was obviously a shock to be sued years later for thousands of dollars more by a collection company that had nothing to do with the transactions.

The basis for this lawsuit is something called the "filed rate doctrine." Under the Interstate Commerce Act (specifically 49 U.S.C. §§ 10761 and 10762), all common carriers are required to charge their customers the rates contained in their tariffs filed with the ICC. The doctrine originated many years ago as a mechanism to prevent secret discounts by railroads to certain large and favored shippers. The policy was to promote fair competition in the railroad shipping industry. It was extended to motor carriers in 1935.

In his dissenting opinion in Maislin, Justice Stevens gives a helpful explanation of the origin of this doctrine. In addition, I am enclosing a copy of two recent decisions by judges from the seventh and ninth circuit courts of appeals, which are referred to by Justice Stevens and which give a good exposition of the history and policy behind this issue.

According to the filed rate doctrine as interpreted by the courts, the only lawful rate on common carrier shipments is the tariff rate. That rate must be collected, no matter what the carrier and shipper may agree otherwise.

Congress substantially deregulated the industry in the Motor Carrier Act of 1980. In amending the first section of the Interstate Commerce Act (49 U.S.C. § 10101), Congress stated its purpose of promoting competitive and efficient transportation services through a variety of quality and price options to meet changing market demands. House Report No. 96-1069 of the 96th Congress, Second Session, states that the 1980 changes were made "to emphasize the importance of competition and efficiency as the most desirable means for achieving transportation goals while, at the same time, providing the Commission with sufficient flexibility to promote public interest."

The deregulatory changes in the 1980 Act wrought significant changes in the motor carrier industry during the 1980's, including doubling the number of carriers in the industry and vastly increasing competition and accompanying price reductions. As a result of these changes, however, the ICC was flooded with cases, either directly or on referral from the courts, in which blind enforcement of the filed rate doctrine was causing obviously unjust results. These cases involved situations, like yours, in which there was no secret discount to a favored shipper, no unfair competitive advantage by one shipper over another, and no industry-wide threat of reduced competition. In other words, the policy goals behind the filed rate doctrine had no applicability.

The ICC responded to this unnecessary injustice with its "negotiated rates" policy. In cases like yours where a carrier negotiated what purported to be a legal rate, and the shipper reasonably relied on and paid that rate, the Commission found that later collection of a higher tariff rate was an unnecessary punishment to the shipper and constituted an "unreasonable practice" in violation of the Interstate Commerce Act (49. U.S.C. §§ 10701(a) and 10704(b)(1)). Under these circumstances, there was no reason to punish the innocent shipper for the carrier's misquotation or failure to amend its tariff.

In your case, the injustice is even clearer. Requiring you to pay a tremendous surcharge only creates a windfall to a collection company for doing nothing at all. This kind of result, under color of enforcing Congress' will, is absolutely outrageous.

As you know, we had your case referred to the ICC and the Commission issued a decision on June 20, 1989. The Commission's decision held that the collection of the alleged undercharges in this case would constitute an unreasonable practice in violation of the Act. We then asked the State Court of Richmond County to enforce the ICC's decision.

In the meantime, the United States Supreme Court decided to hear arguments and render a decision in the Maislin case. The federal courts of appeals across the country were divided on the question of whether such ICC decisions were enforceable. Of the seven courts of appeals that had addressed the question, six had agreed with the ICC and one had gone the other way.

In its June 2, 1990 decision, the majority of the Supreme Court justices disagreed with the ICC and six out of seven appellate courts, and ruled that the filed rate doctrine had to be applied even in situations such as yours. The Court recognized that the doctrine was very likely an anachronism in today's deregulated market. However, the Court held that the ICC did not have authority to make exceptions to the filed rate doctrine; only Congress could do that.

In effect, the Supreme Court has said that the courts of this nation, as well as the agency charged with administration of the Interstate Commerce Act, cannot avoid the harsh and unfair results of collection cases such as yours. The Court has said that it is up to Congress to correct this situation. For this reason, I am recommending that you contact your United States Congressman and make him aware of this situation. I understand that both the Senate and the House of Representatives will be holding hearings in the next couple of weeks on proposed legislation related to this problem.

Delta Traffic Service and other collection companies have been pursuing these types of lawsuits all across the country, and there are many companies in exactly the same position as you. Some of these companies will undoubtedly be driven out of business by these types of surcharge collection actions. The extent of the problem has been estimated at $100 million to $200 million. It is a widespread problem and I expect many companies in many states to contact their Congressional representatives about it. Therefore, there may be a groundswell of support for Congressional action on this matter. The Supreme Court has clearly handed the problem to the Congress.

In the meantime, we are attempting to go back to the ICC and have the applicable tariff rates themselves be declared unreasonable. The Supreme Court has left open this possible defense. However, the best solution to this problem is Congressional measures endorsing the actions of the ICC in its administration of the Interstate Commerce Act.

I will keep you informed of any progress in this case. Please contact me if you wish to discuss these matters further.

Very truly yours,

R. Daniel Douglass

RDD:djr

Enclosures

U. S. HOUSE OF REPRESENTATIVES

PUBLIC WORKS AND TRANSPORTATION COMMITTEE

SURFACE TRANSPORTATION SUBCOMMITTEE

Hearing

July 19, 1990

Testimony presented by

Mr. Pat Scruggs, President
Beverage Control, Inc.
Knoxville, Tennessee

MR. CHAIRMAN: My name is Pat Scruggs, President of Beverage Control, Inc. of Knoxville, Tennessee. We are a small wine and spirits distribution company, in business continuously since 1961, with thirty-one employees.

I appear before you today representing the members of the Wine and Spirits Wholesalers of America, as well as all of the many firms whose economic well-being depends largely upon your expeditious action on the matter before your subcommittee.

To illustrate our specific case, in 1985, Express Transportation Company of Chattanooga, Tennessee solicited our business and submitted their published price list, a copy is attached, to haul wine from California to Knoxville. We purchased their services over a three year period and paid every one of their freight bills exactly as quoted and billed.

Then in January of 1989, we received a letter from a Washington law firm stating they had been retained by a bankruptcy trustee, to pursue immediate legal action against our company in the amount of $129,007.15 for undercharged rates.

We were told that Express Transportion had failed to file the rate with the I.C.C. as required by law, and we were liable for the difference. At no time during our business relationship with Express Transportation Company did we realize that it was our added responsibility to verify that Express was complying with I.C.C. law. It is difficult for me to understand a law that make me responsible for another business not adhering to the law.

As you can see, the June 21 Maislin vs. Primary Steel decision has created a real crisis for me and my business. And I am not alone. Five of my colleague companies in Tennessee alone face similar devastating consequences. Our inability to factor these unanticipated expenses into the framework we have used to determine our cost of doing business years after the fact will have catastrophic effects on us and our employees. It would seem that unless Congress quickly remedies our situation, virtually thousands of shippers, large and small, will be forced to pay millions of dollars in additional freight charges.

As a small businessman, I can ill afford to be penalized with such an enormous unexpected, deferred and unreasonably burdensome billing as that with which I am faced today.

In summary, I would just emphasize once again that our freight business was solicited, at a rate quoted by Express Transportation, and in trying to be good business people, we entered into a bonafide agreement for a fair and reasonable rate, the same as did thousands of other independent businessmen and women. A rate was quoted, we were billed for that exact rate and we paid those bills in full.

This inequity should be corrected, corrected promptly, and provide remedy to those cases now pending.

Thank you again, Mr. Chairman and members of the subcommittee, for your time and consideration. I would be pleased to answer any questions.

* * *

EXHIBIT 'A'

Per-Case Price from ALL CALIFORNIA WINE- PRODUCING POINTS TO:

Eff: 1 July 1985

| DESTINATION<br>($ per case) | 50-250 CASES | 251-500 CASES | 501-700 CASES | 701+ CASES |
|---|---|---|---|---|
| ALABAMA (See Pg.2) | | | | |
| ARKANSAS (all) | 326 | 279 | 255 | 241 |
| GEORGIA | | | | |
| Albany-Athens-Augusta | 410 | 364 | 340 | 326 |
| Atlanta-Columbus-Macon | 370 | 322 | 299 | 250 |
| Brunswick-Savannah | 410 | 364 | 340 | 326 |
| ILLINOIS (Sou. only) | 352 | 306 | 282 | 267 |
| LOUISIANA (North only) | 334 | 287 | 310 | 250 |
| MISSOURI | | | | |
| Columbia (Central) | 330 | 284 | 260 | 245 |
| Kansas City (West) | 326 | 279 | 255 | 241 |
| St.Louis (East) | 334 | 287 | 310 | 250 |
| NORTH CAROLINA (see Pg 2) | | | | |
| SOUTH CAROLINA (all) | 416 | 369 | 345 | 331 |
| TENNESSEE | | | | |
| Bristol | 384 | 337 | 314 | 299 |
| Chattanooga | 367 | 320 | 297 | 283 |
| Knoxville | 375 | 329 | 305 | 290 |
| Memphis | 334 | 287 | 264 | 250 |
| Nashville | 355 | 308 | 285 | 271 |
| VIRGINIA | | | | |
| Abingdon-Bristol-Marion | 384 | 337 | 314 | 299 |
| Danville-Roanoke-Lynch. | 395 | 348 | 325 | 307 |
| Richmond-Petersburg | 416 | 369 | 345 | 331 |
| Norfolk area | 421 | 372 | 351 | 337 |
| North of Richmond | 432 | 383 | 351 | 348 |

ALL charges included in above rate.

50-case minimum charge will apply on EACH stop to pick up.

EACH shipment will be charged on EXACT number of cases shipped (minimum excepted).

* When the number of cases times the case price exceeds the truck load rate from the origin point to the same consignee, the LOWER truck rate will apply.

$ Limit of liability: $50.00 per case unless prior arrangements made.

EXPRESS TRANSPORTATION COMPANY
P O Box 11107
Chattanooga,TN. 37401

## SUBMISSIONS FOR THE RECORD

120 MAIN STREET (BOX Z)
HUNTINGTON, NEW YORK 11743
TEL: (516) 549-8984
FAX: (516) 549-8962

Please reply to writer

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**CLAIMS AND PREVENTION COUNCIL, INC.**
WILLIAM J. AUGELLO, *Executive Director/General Counsel*

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(512) 225-2000

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**And ALL PAST PRESIDENTS**

**Western States Representative**
**W. M. CHEATHAM**
8825 North 86th Street
Scottsdale, AZ 85258
(602) 951-1750

July 25, 1990

Hon. Norman Y. Mineta, Chairman
Surface Transportation Subcommittee
Committee on Public Works & Transportation
RHOB 2165
Washington DC 20515

Re: **H.R. 3243**

Dear Mr. Chairman:

During the course of my testimony on H.R. 3243, permission was given to submit for the record two additional documents relating to:

1) the reasons for the public confusion regarding enforcement of the filed rate doctrine during the transition period following enactment of the Motor Carrier Act of 1980, and

2) the number of carriers that filed for bankruptcy or discontinued operations subsequent to 1980.

Accordingly, we respectfully submit the enclosed documents for inclusion in the record.

The first document is an excerpt from the amicus curiae brief filed by the Council (formerly Shippers National Freight Claim Council, Inc.) in the Maislin case. This chronological review of events in 1980 and subsequent years clearly explains how the Commissioners in office during those early years of "deregulation" of the motor carrier industry contributed to the widespread belief that the Commission was not really interested in enforcing the filed rate doctrine. As a result, technical violations of the tariff-filing regulations flourished throughout the industry.

Shippers are now being victimized by the collection agencies formed to capitalize on this anomaly.

(formerly The Shippers National Freight Claim Council, Inc.)
A NOT-FOR-PROFIT MEMBERSHIP CORPORATION DEDICATED TO THE RESOLUTION AND PREVENTION OF TRANSPORTATION LIABILITY PROBLEMS

The second document contains a listing of many of the motor carriers and freight forwarders having been forced out of business following enactment of the Motor Carrier Act of 1980. This list has been maintained by Athearn Transportation Consultants of Oakland, California as a service to its clients. They are to be commended for the valuable information they are providing to the entire transportation community. However, this list is not a complete listing of defunct carriers. Dun & Bradstreet recently reported that over 6500 carriers have closed their doors since 1980.

To the list of defunct carriers which have been dunning shippers and brokers for alleged undercharges, (See Appendix A to our prepared statement), the following carriers may now be added due to their discontinuance of operations:

AAA Trucking
A.C.B. Trucking
Alleghany Freight Lines
American Eagle Lines
Arrow Carrier Corp.
Bender & Loudon Motor Freight
Berman's Motor Express
Brown Transport
Cargo, Inc.
Dugas Express
Holmes Transport
Pilot Freight Systems
Rapid Freight System
Riss Int'l. Corp.
Schmidgall Transfer, Inc.
Sooner Trucking
Transcon Lines
Tri-State Transportation
Western Desert Express

In view of the collection agencies' past practice of bidding for the right to audit defunct carriers' freight bills, shippers will undoubtedly be inundated with new undercharge claims following the audit of these carriers' bills.

With the Chairman's permission, the Council also desires to add to the record a copy of a Bankruptcy Court's decision denying approval of a proposed contract between a Trustee of a bankrupt motor carrier and a collection agency in a typical undercharge scenario. The enclosed decision formed the basis for my testimony that the trustees usually recover only 20% of the amounts collected from shippers before expenses for administering the estate.

Following the Bankruptcy Judge's refusal to approve this auditing contract, the collection agency bought the freight bills from the trustee for $5,000 and has filed claims and suits against shippers despite the Court's decision.

Also enclosed is a typical settlement order issued by a Bankruptcy Judge in another typical case acknowledging that only 22% of this settlement will be available for unsecured creditors.

The audit agreements in virtually all of these carrier bankruptcies provide for similar fee arrangements. For example, on a $10,000 recovery after the claims are referred to an attorney, the funds are divided as follows:

| | | |
|---|---|---|
| Amount of recovery: | | $10,000.00 |
| Attorney's fee (25%) | $2,500.00 | |
| Attorney's expenses (estimated 5%) | 125.00 | |
| Court Filing Fee | 120.00 | |
| | $2,745.00 | |
| Net | | $ 7,255.00 |
| Collection Agency's (Commission (50%) | $3,627.50 | |
| Net | | $ 3,627.50 |
| Trustee's Fees (Estimated 30%) | $1,088.25 | |
| Net (Before adminstrative and legal fees and expenses) | | $ 2,539.25 |

This evidence clearly demonstrates that unsecured creditors will ultimately realize little if any of the amounts sought from shippers.

In rebuttal to the Creditor's Alliance' allegation that H.R. 3243 treats creditors unequally, we respectfully suggest that this claim is unwarranted. If a shipper is forced to pay an undercharge in freight charges, it must pay 100% of that claim. On the other hand, if a shipper attempts to collect an overcharge in freight charges from the bankrupt's estate, he will receive only a prorata share of the net estate, if any.

In response to the contention that the "Fortune 500 shippers" were the principal beneficiaries of negotiated, unfiled rates, our Council's experience indicates that small unsophisticated shippers were just as vulnerable to this unlawful practice as were large, sophisticated shippers. In the McLean Trucking cases, for instance, the Council's Joint Defense Group is defending over 200 cases which average approximately $8,000 each. The average of all cases in the Council's Joint Defense Groups is under $15,000 per suit. Only 21 suits exceed $100,000, but one-half of these large suits are against brokers and shippers much smaller than the "Fortune 500" catagory.

When the bankrupt carriers were operating, their creditors did not rely on the freight charges sought by the collection agencies as there were no pending undercharge claims at that time. If the carrier had quoted their filed tariff rates when soliciting the shippers' traffic, they would not have obtained their traffic due to the prevailing level of competitive rates. Therefore, these bankruptcies probably would have occurred sooner had they not received this traffic at the negotiated rates.

Furthermore, it is not inequitable to permit a shipper to seek relief from the consequences of carriers' negligence, misrepresentations and fraud, while requiring carriers' estates to refund money to which the carrier was never lawfully entitled due to its negligence in double-billing or overcharging the shipper.

H.R. 3243, as amended by the coalition, provides an equitable solution consistent with the intent of Congress and The National Transportation Policy as reflected in the Motor Carrier Act of 1980. Congress clearly did not intend collection agencies and their attorneys to be the primary beneficiaries of these well-meaning reforms in transportation regulation.

On behalf of a large segment of the victims of this vicious practice, we urge that the Committee seek enactment of this urgently needed legislation before adjournment.

Yours very truly,

William J. Augello

WJA/kp
Enc.

EXCERPTS FROM BRIEF OF
SHIPPERS NATIONAL FREIGHT CLAIM COUNCIL, INC.
AS AMICUS CURIAE
IN MAISLIN INDUSTRIES, U.S., INC. V. PRIMARY STEEL, INC.,
NO. 89-624 SUPREME COURT OF THE U.S., OCT. TERM 1989

### D. The Undercharge Problem Has Been Exacerbated By Public Confusion About The Scope Of The 1980 Act.

The fact that the MCA provided for regulatory detente rather than total deregulation is not universally understood. Misunderstanding as to the scope of the MCA began on the day it was signed into law, when the President was quoted in the media as stating that the new law was a "trucking deregulation bill" which would "eliminate the red tape and senseless overregulation that has hampered the free growth and development" of the trucking industry.[29] As a result of the widespread publicity given to such statements—which omitted the essential qualifier that "deregulation" related primarily to entry and collective ratemaking—it is fair to assume that many shippers and carriers, particularly small business owners without regulatory sophistication, were led to believe that truck rates had been deregulated as well.

After the MCA was signed into law, additional public confusion no doubt resulted from the well-intended efforts of certain former Commission members to communicate to the public the pro-competitive changes that had in fact taken place. One former Commissioner admonished shippers to plan their business strategy as though regulation did not exist.[30] At the same time, decreases in the Commission's staff forced it to develop and announce a "harm standard" for allocation of enforcement efforts.[31] Under this policy, as later summarized in a 1984 public announcement,[32] the Commission instructed its enforcement staff to devote its limited resources to prosecution of only the most flagrant violations of law. To implement this new "pro-market" policy,[33] the Commission established a list of "high-emphasis" violations which were to receive "the greatest allocations of enforcement resources by the Commission's Office of Compliance and Consumer Assistance," and which received widespread publicity in the transportation press. *Undercharges, tariff violations and discriminatory rates were notably missing from this list*, a signal which was not overlooked by carriers and shippers, or by enforcement personnel.

---

[29] New York Times, July 2, 1980, at 1, D5.

The transportation community was given further evidence of the Commission's departure from its previously strict tariff enforcement policies and prosecutions under the Elkins Act (codified at 49 U.S.C. §§ 11902, 11903) by the agency's decision to permit a major railroad to waive collection of the technically applicable tariff charges on grain shipments moved in motor-for-rail substituted service. *See Scoular Grain Co. - Petition for Declaratory Order*, No. 39743 (I.C.C. served Feb. 25, 1985). Of greater significance, however, was the Commission's concluding statement in that decision:

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[30] Transport Topics, Sept. 29, 1980, at 1 (reporting on address of then Commissioner Trantum to the National Small Shipments Traffic Conference).

[31] Address of former ICC Chairman Gaskins to a trade group of refrigerated commodity carriers, reported in Traffic World for July 28, 1980, at 17.

[32] ICC News Release, Aug. 9, 1984.

[33] *Id.*

> We direct the Office of Compliance and Consumer Assistance to terminate its investigation of [another shipper], *and any other investigations of a similar nature*. In general, investigations of this nature which focus on technical problems that have already been corrected through appropriate tariff amendment, are of doubtful benefit to the public.

Slip op. at 5 (emphasis added).

While the particular result in *Scoular* might be viewed by most members of SNFCC as pro-competitive and benign, the same is not necessarily true of the broader signal the decision sent to the carrier and shipper communities. Simply stated, the fear of prosecution for Elkins Act violations dissipated. Tariff violations flourished throughout the motor carrier industry, as demonstrated by the subsequent flood of undercharge cases. Although there were intermittent ICC efforts to revive enforcement activity against flagrant violators of tariff regulations,[24] these efforts quickly engendered congressional criticism that the Commission was attempting to reregulate trucking.[25]

The ultimate result of these confusing signals—in conjunction with the regulatory changes that the Commission actually adopted—was widespread disregard for tariff-filing requirements by the motor carrier industry.[36] In some cases this disregard appears to have been intentional (*see infra* Part III), but in other cases it was probably attributable to the sheer volume of discounts being negotiated on a daily basis, coupled with a widespread belief in the industry that tariff filings had become a low-priority relic of a bygone regulatory era. Upon realizing the scope of the unanticipated problems resulting from the regulatory environment described above, the Commission moved to take corrective action.[37] For this it should be commended, not condemned.

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[24] *See* Traffic World, Aug. 10, 1981, at 21 (reporting on address of former ICC Chairman Taylor to New Orleans Traffic and Transportation Bureau).

[25] *See* Traffic World, Feb. 8, 1982, at 6 (reporting full text of Joint Economic Committee report in this regard). The committee report quoted former Civil Aeronautics Board Chairman Alfred Kahn as criticizing the ICC for proposing an expanded enforcement budget. In Chairman Kahn's words:

> Enforcement [means] prohibiting price competition. It means examining every tariff, every price change, and making sure there was never a deviation from the tariff. That is a very good way of preventing price competition.

Under all the foregoing circumstances, the Commission justifiably concluded that it would be unreasonable to continue a rigid policy of charging shippers with constructive notice of all tariffs, thereby holding shippers accountable for *carriers'* violations of tariff-filing regulations.[38] Because of the same circumstances, the great majority of federal district courts and courts of appeals have affirmed the ICC's policy of relieving shippers of constructive notice of all filed tariffs,[29] as is demonstrated next.

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[36] *See* dissent of Commissioner Simmons in *Traffic Improvement*, *supra* note 14, denouncing repeal of tariff symbolization requirement as sending "an incorrect signal that the Commission has lessened its commitment to the integrity of the tariff system."

[37] During an open voting conference on May 8, 1986, at which the ICC adopted the policy announced in *Negotiated Rates I*, it was explained that:

> The problem is not, however, strictly limited to bankrupt carriers. The comments indicate it may be more widespread and it appears to have occurred as a result of the extensive price competition since the Motor Carrier Act *and the impression of some shippers that deregulation had occurred, obviating the need to use or check the tariffs themselves.*

Tr. at 7 (emphasis added).

[38] In its *amicus curiae* brief filed during October of 1989 in *Delta Traffic Serv., Inc. v. Transtop, Inc.*, No. 89-1662 (1st Cir.), at 13, the ICC argued:

> The only way for a shipper (or broker acting on behalf of shippers) to determine the terms of a carrier's filed tariffs at the time of shipment is to hire someone to physically examine the tariffs at the Commission's headquarters in Washington. At a time when carriers can lower their motor carrier rates on one day's notice, it would be a herculean task to check the Commission's public tariff files daily.

## III. Widespread Carrier Misrepresentations, Inadvertent Or Otherwise, Distinguished The Post-1980 Environment From The Pre-1980 Period, And Justified The Commission's Careful Exercise Of Its Reasonable Practices Jurisdiction

In the highly regulated environment prior to 1980, the ICC rarely exercised the reasonable practices jurisdiction delegated to it by Congress in 49 U.S.C. § 10701(a) (1982). This Court had occasion to uphold the Commission's finding of unreasonable practices by a motor carrier only in a misrouting case, *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962). Avoidance of the filed rate in the isolated instances where fraud, deception, misquotations and negligence were raised as a defense thereto was not permitted by the Commission due to its strict policy against discrimination. *Louisville & N.R.R. v. Maxwell*, 237 U.S. at 97. *See* 49 U.S.C. § 10741(b) (1982).

However, the conditions which confronted the Commission following the introduction of regulatory detente under the MCA compelled the agency to re-activate its powers under 49 U.S.C. § 10701(a) (1982). Upon granting shippers' petition for the rulemaking which led to the *Negotiated Rates* decisions, the Commission stated as follows:

> While we view the present [pricing] activity of carriers as an expected and desirable means of competition, which is totally consistent with the goals of the MCA, it appears that some motor carriers may be misusing the new pricing freedom.

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[29] *See, e.g., West Coast Truck Lines, Inc. v. Weyerhaeuser*, 893 F.2d at 1026 ("The ease of filing tariffs and the sheer number filed no longer makes it appropriate to allocate the burden of discovering a filed rate to the shipper in all cases."). *Cf. Carriers Traffic Serv., Inc. v. Anderson, Clayton & Co.*, 881 F.2d at 482.

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

In re:

Case No. 87-82679

UNZINGER TRUCKING, INC.,

Debtor.

FOR YOUR INFORMATION
PRIMUS LAW OFFICE
NO RESPONSE NECESSARY ☒
PLEASE CALL WHEN YOU RECEIVE THIS. ☐
TELEPHONE: (612) 333-0909
TELEFAX: (612) 333-1366

*******************************************************************

CHARLES E. COVEY, Trustee,

Plaintiff,

vs.

A. J. C. INTERNATIONAL,

Adversary No. 89-8266

Defendant(s).

## NOTICE OF COMPROMISE AND NOTICE OF INTENT TO PAY CONTINGENT COLLECTION FEES

TO ALL CREDITORS AND OTHER PARTIES IN INTEREST:

YOU WILL HEREBY TAKE NOTICE that Charles E. Covey, Trustee and Plaintiff in the above captioned case, proposes to settle the above adversary proceeding for $1000 and states as follows:

1. The Trustee in adversary no. 89-8266 previously filed suit against A. J. C. INTERNATIONAL for seeking to recover $3,545.44 for freight undercharges.

2. The Trustee's attorneys, Harris & Taylor of Minneapolis, Minnesota, have recommended that the Trustee accept $1000 in settlement of the litigation. The Trustee proposes to accept said settlement because it is reasonable, fair and avoids the uncertainty and expense of litigation.

3. The Trustee further proposes to pay Harris & Taylor a

25% contingent fee of $250 out of which $50 will be paid to local counsel, Covey & Litterest, Ltd.

4. In addition, 70% of the net recovery, or $525, less $120 in court costs will be paid to TransAllied Audit Company of Bloomington, Minnesota. Approximately 22% of this settlement will be available for unsecured creditors.

5. Any person who objects to the above must file an objection in writing with the Clerk of the Bankruptcy Court, 100 N.E. Monroe, Peoria, Illinois 61602,on or before the 31th day of July, 1990.

Questions concerning the above settlement should be directed to the Trustee's attorneys, Harris & Taylor, 2850 Metro Drive, Suite 319, Minneapolis, MN 55425 (612) 854-3996. Dated at Peoria, Illinois this 11th day of July, 1990.

Charles E. Covey, Trustee

Charles E. Covey, Trustee
525 Peoria Savings Plaza
Peoria, Illinois 61602

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

In re:

Case No. 87-82679

UNZINGER TRUCKING, INC.,

Debtor.

*************************************************************************

CHARLES E. COVEY, Trustee,

Plaintiff,

vs.

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Defendant(s).

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3. The Trustee further proposes to pay Harris & Taylor a

If litigation is deemed necessary by Trans-Allied Audit, then it selects an attorney, contrary to 11 U.S.C. §327 which contemplates that a trustee would choose an attorney and hire that attorney, but only after court approval. As compensation, any attorney so selected would receive a maximum of twenty-five percent of the amount recovered plus the attorney's costs, including at the very least, a filing fee of $120.00 and costs of service. The agreement provides that Trans-Allied Audit or its attorney may settle litigation commenced or disputed claims not put in litigation without court approval, contrary to Bankruptcy Rule 9019.

Trans-Allied Audit would receive as compensation for its services, seventy percent of the net recovered by the trustee after deducting the attorneys' fees and expenses. Compensation to Trans-Allied Audit and its attorney would apparently be paid by the trustee without court approval contrary to 11 U.S.C. §§330 and 331.

Thus, in the typical case involving litigation,[2] the trustee and the estate would net approximately twenty-one percent of the amount collected. I arrive at this amount by assuming that the average attorneys' fees cost of collection will amount to five percent of the amount collected which, when added to the twenty-five percent attorneys' fees, means that the attorney would take thirty percent of the amount collected off the top. The trustee would then receive thirty percent of the remaining seventy percent, for a total of twenty-one percent of the amount actually collected. This is without even discounting for the compromise of claims before recovery and any additional costs incurred by the trustee for trustee's fees and expenses in running this collection process.

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[2] In this case, that apparently will involve most claims, since there is obviously insufficient time to send out demand letters and receive replies and then proceed into litigation, all before September 1st.

In the mean time, in order to collect this twenty-one percent for creditors, enormous amounts of bankruptcy court administrative and judicial time are utilized to collect amounts which range anywhere from a few hundred to several thousand dollars. While the debts may be legally due under the statute, their collection after the customer has already paid an amount which it agreed upon with the debtor, is inherently unfair and does not reflect well on the bankruptcy system. If the amount to be recovered on these claims was an amount that would be significant for creditors, then the drain on the court's resources and reputation may be worth it. However, where the main result of the process is to make money for audit companies and their attorneys, it is very difficult to justify.

Thus, while I know that the trustee is sincere in her efforts to realize something for the estate, I simply cannot justify employment on these terms.

THEREFORE, IT IS ORDERED: The trustee's motion to approve her employment of Trans-Allied Audit Company, Inc. is denied.

ROBERT J. KRESSEL
CHIEF UNITED STATES BANKRUPTCY JUDGE

# ADDITIONS TO THE RECORD

STATEMENT OF
FRED M. BRODY
PRESIDENT OF FRED M. BRODY & ASSOCIATES, INC.

BEFORE THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

UNITED STATES HOUSE OF REPRESENTATIVES

JULY 19, 1990

FRED M. BRODY & ASSOCIATES, INC.
PO BOX 85
WESTFIELD, NJ 07091
800-255-3912

I am Fred M. Brody, President of Fred M. Brody & Associates, Inc., Westfield, New Jersey. My company began operating as a freight brokerage firm in June of 1984. I employ 4 full time operating people and have 7 commission sales people.

Our operation is designed to handle LTL (less truckload) quantities, however, we also place full truckloads. We concentrate on LTL because, 1.) the shipper and carrier need our help in coordinating, and 2.) the truckload rates are so depressed coming out of our region that it is the only freight many carriers want to haul. All freight we move is put out for bid to get the most competitive price and performance combination from the carrier base we use; well over 100 carriers.

Just as we bid all moves with potential carriers, so do the shippers that call our office. Before most shippers move their freight nowadays, they try to find the lowest possible rate. This sometimes creates a false demand for equipment because after we negotiate with the carrier, we call the shipper back with a price and find out that the freight has moved already. We do not force any carrier to accept less than what they need to cover their costs and make a profit.

I am very fortunate to have been given an opportunity to develop a new business from the new industry created from the partial deregulation of the trucking industry with the passage of the Motor Carrier Act of 1980. I am fulfilling the American dream of free enterprise, entrepreneurship, and capitalism that our Country is founded upon. To make sure I was doing the proper and ethical things, I spent time in Washington, D.C., to get a better feel for how the ICC and other government agencies were guiding this newly founded industry. With some of the inefficient barriers to business taken away, there was more freedom to run a more efficient business and help bring economies to most shippers and carriers.

Now, after a lot of hard work, I found that the Supreme Court's decision to uphold the filed-rate doctrine means that the transportation industry had been misguided and rewards have been granted to carriers that have violated their tariff regulations.

For example, I have been hit with a balance due claim from Roseway, Inc., Des Moines, IA., for $10,620.75. This represents only 8 shipments that we placed with this carrier during 1988. We handled these shipments the same way as I previously described. A shipment of 1 case weighing 3500 pounds was moved at a negotiated rate of $400.00. The balance due is $3000.00. The shipper never would have agreed to pay anywhere near $3400.00 and we never would have made the move. Other carriers we called for this move wanted the same price, but had no equipment in position. I did not hold a gun to the head of the Roseway owners to force them to take this shipment for $400.00. That was the price they quoted and I paid. I am sure Roseway had other freight on that truck before it left our region besides our 3500 pound crate of machinery. Am I the only one that has to pay for the truckload or do the other shippers on that truck also have to pay the truckload rate, too?

To alleviate the major problems created by the Supreme Court's Maislin decision, we need the Congress to pass legislation that will reverse Maislin and find the collection of additional tariff rates to be an unreasonable practice.

The strict adherence to filed-rate doctrine is not compatible with deregulation and the open market philosophy that the

ICC has encouraged. It only created a windfall for the lawyers and collection agents and hurts our economy and our global competitiveness.

I appreciate the opportunity to provide this testimony to you.

Respectfully,

Fred M. Brody,
President,
Fred M. Brody &
Associates, Inc.

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON SURFACE TRANSPORTATION of the
COMMITTEE ON PUBLIC WORKS

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## WRITTEN STATEMENT

## OF THE AMERICAN TRAFFIC EXCHANGE

Prepared by: Paul Carrano, President
American Traffic Exchange, Inc.
P. O. Box 7040
Greensboro NC 27417

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BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON SURFACE TRANSPORTATION of the
COMMITTEE ON PUBLIC WORKS

---

WRITTEN STATEMENT

OF THE AMERICAN TRAFFIC EXCHANGE

Prepared by: Paul Carrano, President

---

## I. INTRODUCTION

I am Paul Carrano, president of American Traffic Exchange, Inc. (AMTEX), whose administrative offices are located at 1609 West Magnolia Boulevard, Burbank CA 91506. AMTEX is a non-profit corporation formed in 1988 by transportation brokers to serve primarily as their surety source, and also to provide an "exchange" for credit information concerning broker\members to shippers, carriers, and all who would desire a "credibility check-point" prior to business activity with a broker\member. AMTEX also provides claims assistance to all involved parties, including the judiciary.

We appreciate the opportunity to present this testimony as part of the written record for the hearings concerning HR 3243 to amend Title 49 of the U.S. Code regarding the collection of over-payment or undercharges on shipments via motor common carriers.

## II. STATEMENT OF INTENT

It is the intent of this organization to illustrate the mistake by Congress when they did not repeal the filed rate doctrine of 1935 when Congress deregulated motor carriers with the motor carrier act of 1980.

AMTEX wishes to give testimony at these hearings in support of legislation that will eliminate the filed rate doctrine, thus forever eliminating the costly abuse to the economic infrastructure of our national transportation system, U.S. shippers, and ultimately the nation's competitiveness.

This debauchery of justice has taken place as a result of the anachronism known as the "filed rate doctrine," which has allowed unscrupulous opportunists a loophole through which they can suck hard-earned dollars from honest shippers through a wall of intended fairness we call regulation. Indeed these opportunists will suck the very life from every industrial shipper and broker, large or small, bankrupting most if they are allowed.

If the filed rate doctrine and the Maislin decision are not reversed immediately with retroactive benefits to the nation's shipping community, the effect will be devastating to the U.S. economy.

It is further the intent of AMTEX to illustrate the **NON-NEED** the motor carrier industry has for rate regulation of any sort.

In the alternative, we support TBCA's request of ICC referral; however, AMTEX contends this suggested remedy merely prolongs a costly injustice. Such a process not only will continue to devastate our country's ability to compete in world commerce but could possibly backfire as Maislin did to cause more permanent damage to America's competitive capabilities.

## III. STATEMENT OF OPINION

Interstate commerce rates and rating have got to be totally deregulated (unregulated). The half-step that Congress took when creating the Motor Carrier Act of 1980 has served its purpose. We now know the American transportation system can work effectively in an unregulated environment.

Congress must now finish the job, and get the American shipper out of this costly nightmare developed by the Supreme

Court's decision of Maislin. This half-step experiment into deregulation by Congress, an appropriately cautious attitude at the time, has now turned into something reminiscent of "the night of the living dead." We have an abomination which should be dead attempting to devour us, American manufacturers, shippers, and brokers; and indeed it will devour us by draining our energy, our ability to produce, and to compete in the world market of today.

America simply does not have a budget to support motor carrier rate regulations any longer. The Department of Transportation has proven it can and will guard our safety and transportation infrastructure. America no longer needs someone to guard our businesses, small and large, against service failures or price discrimination as it did in 1887 and 1935, except possibly in the railroad arena. There are more than enough carriers and would-be carriers to serve literally every shipper's needs no matter how diverse they are.

We have learned since 1980 the problems that will evolve from an economically unregulated national transportation system relative to motor carriers will be those of an antitrust nature, and they are best handled by the Department of Justice. In that respect and during this test period of deregulation, we have already seen charges of predatory pricing and we should suspect, as in all business circles, the largest of corporations may attempt to misuse their girth to sway markets and market share in an unfair manner. A keen awareness and quick response by the DOJ to these abuses will restrain, if not stop these attempts.

We have also learned since 1980, America no longer needs, NOR CAN AFFORD, rate regulation. American business people are now sophisticated enough to negotiate their own service needs and fees for same. Finally, their needs will be amply met in the free market place, as is attested to by the Interstate Commerce Commission. Indeed, the ICC is investigating the veritable need for "Rate Bureaus" and their antitrust immunity as these hearings take place. The time has come for Congress to act, and the Commissioners of the Interstate Commerce Commission, we believe, are inclined to agree-- there is no real value for the nation in perpetuating the filed rate arguments, and most possibly in the perpetuation of any motor carrier regulatory function as they are currently applied by the ICC except in the case of proof of liability insurance, and that can be monitored by the DOT as part of their safety program.

Therefore, AMTEX presents the only logical solution to the abuse (the Maislin decision) to our system of interstate commerce is to abolish the antiquated filed rate doctrine of 1935. It no longer serves the purpose for which it was created.

We the members of AMTEX herein pray that Congress immediately reverses the Supreme Court's decision on Maislin and releases brokers, shippers, and the U.S. economy from the costly confusion caused by the filed rate doctrine as it applies to interstate motor carriage by ultimately repealing the filed rate doctrine in the next congress.

## IV. STATEMENT OF FACTS

1. The filed rate doctrine was written and enacted by Congress to avoid discrimination of shippers by carriers. The possibility of discrimination was based on an inadequate and/or inefficient number of carriers to support the current level of business in 1935. It was a time when such a shortage of motor carriers could have led to discriminatory pricing and harm to a young country's ability to grow its economic and commercial prowess.

2. With the improved highway systems that have developed in our country and the small business boom, there are thousands of carriers for each shipper to choose from. It is no longer a "buyers over" market, but rather in the motor carrier sector of our national transportation system, we have a "sellers over" market or in other words, a surplus of motor carrier service suppliers which promises no shipper will ever suffer a rate/service discrimination.

3. The ICC regulations over motor carriers actually

restrict trade. Prior to 1980, there existed less than 6,000 motor carrier authorities issued by the ICC to serve the nation's shippers. Since 1980, over 90,000 authorities have been issued by the ICC, proving that the lessening of regulations has spawned new businesses to develop. It can also be then concluded that the nation will enjoy even more motor carrier service suppliers if the motor industry was totally unregulated, except for safety.

4. The DOT is ready, willing, and able to take over any and all insurance responsibilities now handled by the Interstate Commerce Commission.

WESTGATE TRANSPORTATION, INC.
TRANSPORTATION MANAGEMENT CO.

2710 Schoenersville Rd
Suite 114
Bethlehem, PA 18017
215-866-8001
800-637-8001
FAX 215-866-3775

July 12, 1990

U. S. House of Representatives
Subcommittee of Surface Transportation
c/o Rep. Glenn Anderson, Chairman
Room 2165 Rayburn House Office Building
Washington, DC 20515

Attention: Committee Staff

As an ICC licensed property broker, I am extremely concerned about the recent Supreme Court decision in the Maislin vs. Primary Steel Case.

Westgate Transportation, a full service transportation broker began operations in 1983, with the purpose of providing shippers and receivers within our region an opportunity to access a variety of previously untapped transportation resources, which became available as a result of the Motor Carrier Act of 1980.

In arranging transportation services for our clients, we take into consideration the best price/service combination for each individual transaction. Our clients have come to trust our judgement in the selection of carriers to meet their needs and as a result these smaller shippers have been able to purchase transportation services at cost comparable to those of major shippers. Considering our clients trust, we have been selective in our carrier base. About fifty percent of the freight movements arranged by Westgate Transportation are handled by private fleets holding contract carrier authority. This type of transportation has proven to be extremely reliable in every aspect and we can rest assured that our client's cargo is in good hands. By and large, the majority of our carrier relationships are contractual; however, for a variety of needs, we have been forced to deal with some carriers on a common carrier basis.

Because of the Maislin Decision, one can only speculate as to the millions or perhaps billions of dollars in undercharge claims that could face shippers, receivers and taxpayers in general. The only beneficiaries of this decision are the bankruptcy attorneys, the collection agents and their attorneys.

I urge you to formulate immediate legislation, overturning the Maislin Decision and affirming the primary jurisdiction of the ICC in settling these "negotiated vs. filed rate" cases.

Sincerely,

Thomas A. Fiorini
Vice President

TAF:bd

STATEMENT OF

VIRGINIA HIWAY, INC.

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE OF SURFACE TRANSPORTATION

JULY 19, 1990

I am David E. Gee, President of Virginia Hiway, Inc. headquartered at 2734 Cofer Rd Richmond, Va. Our telephone number is 804 231 6209. Our company was started in June of 1977 as an agent for a large special commodity division carrier. In 1983 we made application and received our brokerage license. We presently arrange transportation on over 10,000 shipments per year, with offices in Richmond and Norfolk, Va. and Charleston, S.C.

Our company has always enjoyed the highest Dun & Bradstreet rating possible, which is 1A1. We have had the same surety bond since 1983, and this bond has never been so much as inquired upon.

The 1980 Motor Carrier Act meant that we no longer had the awkward task of providing hauling capacity for our shippers through trip leasing under the authority of our major carrier. Not only did we inspect the equipment we leased, but also made out long contracts, cut carrier bills, issued carrier advance drafts, required copies of driver logs, and provided other legal and carrier control documents for the spot leasing of our equipment. Usually the owner operator, or fleet driver would literally leave the scene where our load was picking up, drive some 125-175 miles back to our office, get his proper documentation, then drive back to the point of loading. All of this created much duplicity, wasted fuel, wasted manpower, lost productivity, frustratio and aggravation. We welcomed the ease of entry created by the 1980 Motor Carrier Act, and quickly aligned our company to take advantage o the changes. Our business, as well of many of our small shipper's business has benefited from the betterment of the Act.

One area of the Motor Carrier Act that had seemingly been the intent o Congress, but yet, not written in language that is clear is the matter dealing with rates, and the application of the filed rate

doctrine.
The Act appeared to be written and structured to allow for the most efficient transportation services possible, eliminating fuel and driver productivity wastes.

The intent of the Act, and our most respected Interstate Commerce Commission strongly supported the foundation for a reasonable negotiated rate policy for the economies and efficiencies of the market place. In fact the Commission verbally and in written policy took the position that it was an unfair practice for agreed rates to be changed after responsible parties lent themselves to the original agreement. The recent Supreme Court decision in the Maislin case is contrary to and counterproductive to the recent Commission interuptations and the intent of the original Act. We strongly encourage quick decisive action that will remove all ambiquity.

Our company has suffered the direct expense of litigation, preparation of, documentation, and the time consuming effort of the dilemma of the issue. In our first case in 1984, we sent a common carrier copies of rates to be published, received confirmation from them that they were published, paid them the agreed tariff rates which we felt was in place, and eliminated several thousand empty miles per month. In 1987, after the company was sold, the departing traffic manager of the defunct carrier sold the freight bills to an auditing firm. This firm, audited the bills, found the tariff was not timely filed as agreed to, and sent my company balance dues on many transactions. This proved to be an embarrassment to the previous officers of the company that we dealt with. The actions of this traffic manager brought many other balance due problems to previous customers of the company. They offered to buy the bills back at considerably more money than the auditing company paid, but their offer was refused. We settled this case out of court, and the officers of the trucking company paid 1/2 of the settlement claim.

We have had other balance due problems, and presently have some in litigation, pending H.R 3243 action, and several others that will go to litigation if clairification of the Committee is not rendered. One case involves an auditing company that has reviewed the freight bills o a carrier that had both contract and common carrier authority. The auditor claims that the contract we had did not meet the letter of the law, and consequently the higher class rates under the carriers' common carrier authority should apply. There is no question that they will legally pursue this now with all vengeance, since the rates are 250 to 300% higher than the rates that were agreed to, invoiced, and paid to the carrier over 3 years ago. The Supreme Court's decision assures an avalanche of legal actions!

What was the intent of the lawmakers that designed and voted on the 198
Motor Carier Act?
What is the present climate?
Do we want to go back to days of stringent control?
Do we want to tell a company to "dead head" their trucks upwards of 2,000 miles because they have the wrong type of authority, or because they do not have a fax machine to instantly transmit a contract?
Do we want to tempt people to "set up" shippers and perpetrate fraud because of the filed rate policy?
Do we want to tie up our judicial system with millions of dollars worth of cases on this issue that primarily benefits a party that has nothing

to do with the original transaction?
Do we want our American manufactures to be at a disadvantage with their foreign neighbors?

We need immediate legislation that would relieve the Maislin decision. We also need affirmation that would clearly allow two responsible parties to make a market place decision that is supply/demand related. The law should not allow a third party to bring action! The law should not have a statue that allows up to five years for one grieved party to take action against the other. The law should be clearly written so that the enforcing body, the Interstate Commerce Commission does not have to guess at Congressional intent, but rather to have the statues written concisely.

A lack of action will seriously jeopardize the foundation of a free market economy in our brokerage business. No longer can we be the champion of a small shipper, or a small family truck line. Instead, our 1150 motor carrier base, our 250 member customer base, and the number of succesful market place transactions would have the constant threat of outside interferances.

On behalf of our employees, our customers, our carriers, our lower courts, our previous I.C.C. Chairman, and the market place, I encourage swift, quick and precise legislative action to correct the ommissions of a previous bill.

STATEMENT OF

**ALLEN LUND**

BEFORE THE
SUBCOMMITTEE ON SURFACE TRANSPORTATION
OF THE
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
OF THE
UNITED STATES HOUSE OF REPRESENTATIVES

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IN A HEARING CALLED TO CONSIDER
NEGOTIATED RATES IN THE TRUCKING INDUSTRY
AND H.R. 3243

July 19, 1990

I am Allen Lund, My company is the Allen Lund Company. We broker truck transportation. We handle "general commodities", meaning a wide range of commodities.

I started the company in 1976. We have grown to include nine offices, across the country, employing more than 50 people. We now broker about 25,000 trucks per year, with gross revenues in excess of 35 million dollars. We have become one of the larger brokers in the trucking field, though not the largest.

Our company started operations in an area exempt from federal regulations: truck transportation of fresh fruits and vegetables. We expanded into regulated trucking after 1980. The Motor Carrier Act of 1980 made this expansion possible.

I want to explain briefly how the Motor Carrier Act made expansion of our service possible. If you see why we could expand useful services in a freer market, you will see more clearly how the filed rate doctrine is out of date and harms companies like mine.

Our company was able to expand into regulated trucking because

> ease of entry in trucking increased the supply of truckers and increased competition among them for freight;
>
> the expansion of contract carriage, along with the increase in carrier competition generally, made carrier prices flexibly responsive to the market; and

the Commission recognized the nature of brokerage, and allowed regulated brokers much of the flexibility of operation which we had in the unregulated sector.

These changes also increased competitiveness and efficiency in regulated trucking. However, the Motor Carrier Act was not a complete charter of freedom. It left on the books a number of regulatory relics. The tariff system in general, and the filed rate doctrine in particular, are among these relics. These anachronisms threaten my company, hundreds of other brokers, and thousands of shippers in the U.S.

The legislative proposal before you permits the commission to approve negotiated rates which vary from tariffs, on a case by case basis. Allowing administrative exceptions from tariffs is vastly better than the law as laid down in the Maislin case. As a practical matter it would eventually stop carriers and collection agents trying to collect higher rates than they quote shippers and brokers. The collection agents, bankruptcy trustees and carriers would learn that they would probably lose a challenge in the courts or the Interstate Commerce Commission. Then they would stop trying to collect rates higher than those quoted their buyers.

Congress could solve the problem more cleanly by simply doing away with the requirement that common carriers file binding tariffs with the commission. I know H.R. 3243 does not propose this. However, if you see why binding tariff filings are unnecessary in the first place, you will clearly see why you should, at least, provide for administrative exceptions from them.

The history of transportation regulation teaches that when Congress enacted tariff filing requirements, early in the 1900s, it believed it needed an administrative agency to keep railroad rates at reasonable levels. At that time Congress also believed that it needed an agency to prevent rail common carriers from giving much better rates to some shippers than others. Congress carried this system over to motor carriers when it imposed the railroad regulatory system on them in 1935.

The Motor Carrier Act of 1980 presumed that increasing competition among carriers would do more to keep carrier rates at reasonable levels than did agency controls. The logic of the Act leads to the conclusion that such competition will do more to prevent some shippers being disadvantaged vis-a-vis others than did agency controls.

I know from experience that this presumption and this logic are valid. Competition among truckers transporting agricultural goods produced much better rates and service than the regulated truckers provided over the entire 1935 - 1980 period. I knew it from personal experience in the 1960s and 1970s. Studies by the Agriculture Department attested to this. After the MCA of 1980, rates and service in the regulated service improved greatly. Today, competition keeps truck rates close to the minimum necessary costs of service. Competition also keeps truck service near the maximum the customer is willing to pay for.

Close competition between truckers also prevents carriers favoring one shipper over another without a good cost justification. Suppose a carrier attempts to give one shipper a much better deal than another, without cost justification. This just creates an opportunity for a competitive carrier. The competitive carrier will offer that shipper better rates or better service, or both. I understand from the academics that this is a good price theory. I know from a lifetime of experience that this is the way the truck market actually works. We see it every day.

Tariff filings with the Commission are irrelevant in today's transportation market. They were designed to permit the Commission to perform a service it no longer needs to perform, and cannot perform as well as the competitive truck market.

What price quote do the people in the truck market think is important to their business transactions? Obviously, the important price quote is the price which the carrier offers and the shipper or broker accepts, at the time of the transportation transaction. The price which the supplier and buyer agree upon in making their deal is the governing price in virtually all other lines of business. Everyone in business understands that, and most consumers as well.

This understanding is deeply ingrained. We all feel outraged when a seller quotes us one price and then tries to collect a higher price. We call it fraud. In some circumstances that practice could get you jailed, or heavily fined. Shippers and brokers feel just as strongly about this as most Americans.

We have reason to feel strongly. A broker works on a small margin -- usually 10% or less of the freight bill. If a carrier tries to collect a rate of 10% or more higher than we agreed upon and relied upon, he wipes out our profit on the transaction. If this happens often, we must either raise our margin, making trucking more costly, or go out of business.

Further, we abhor seeing the force of the law put behind fraudulent conduct. When this happens, you know the law is wrong, and must be changed.

The "filed rate doctrine" is just one of the regulatory relics which Congress left in the law in 1980. There are many regulatory authorities left to be misused. For example, some carriers are trying to get the Commission to set a floor under their rates, above competitive market levels. I cannot begin to tell you in a few words how wrongheaded this proposal is. Some carriers constantly try to get the Interstate Commerce Commission to hamstring and hogtie brokers. Some of these carriers may not understand how to function in an ordinary competitive market. Others, we think, want to eliminate the competitive thrust we put into the market.

This is our recommendation. If you can quickly eliminate this "filed rate doctrine" throwback to an obsolete era, do so. If you cannot or do not act quickly, you in Congress should use the additional time to give the MCA a good, thorough purge of obsolete regulatory authorities and doctrines, from the ground up.

ACROPOLIS
TRANSPORTATION
SERVICES, INC.

for record

MC-196562

July 11, 1990

The Honorable Glen M Anderson, Chairman
The Subcommittee on Surface Transportation
Committee on Public Works and Transportation
U S House of Representatives
Room 2165 Rayburn House Office Bldg
Washington DC 20515

Dear Chairman Anderson;

My name is Gary Matthews and I am writing on behalf of:

Acropolis Transportation Services, Inc.
PO Box 3300
Elizabeth, NJ 07207

ATS is an ICC property broker since 1986 and we wish to have our views entered as testimony in your review of Maislin Industries, U.S., Inc v. Primary Steel, Inc. as well as HR 3243.

Our company exists thanks to the change of regulatory climate resulting from the Motor Carrier Act of 1980. The spirit of this legislation allowed innovative individuals an opportunity to develop a service business, bringing efficiencies and cost reductions to a market place crying for relief since the Motor Carrier Act of 1935.

As a broker, we enter into general contracts with each of the 300 to 350 carriers we work with. These carriers are common or contract carriers with many holding dual authority. With each transaction we also execute a specific contract listing the origin, destination and specific negotiated rate for the transaction.

With the recent Supreme Court decision in the Maislin Case, we can no longer feel protected by the contractual agreements we've entered into in good faith. As a small business we now are threatened with the high cost of defending ourselves from the "pirates" who add nothing of value to the commerce of transportation but feast off the bones of failed motor carriers. Additionally, we are threatened by viable carriers who see an opportunity to turn their past negotiated transactions into undeserved cash, by using higher filed rates with the ICC as a basis to attack brokers they no longer work with.

*EXECUTIVE OFFICES & MAIN TERMINAL*
1-71 NORTH AVENUE EAST · PO BOX 3300 · ELIZABETH, N.J. 07207 (201) 351-5990

Only through passage of legislation overturning the Maislin decision can the "free market" spirit of the Motor Carrier Act of 1980 be restored. I encourage your committee to strongly consider legislation similar to HR 3243.

Sincerely yours,

Gary Matthews

Gary Matthews
Vice President/
General Manager

STATEMENT OF

**DONNA R. McCANN**

PRESIDENT OF McCANN'S TRANSPORTATION, INC.

**BEFORE THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION**

**UNITED STATES HOUSE OF REPRESENTATIVES**

JULY 19, 1990

McCANN'S TRANSPORTATION, INC.
1021 SOUTH 39TH STREET
ST. LOUIS, MISSOURI 63110
800-533-6243

My name is Donna R. McCann. I am president and chief executive officer of McCann's Transportation, Inc., an I.C.C. licensed transportation brokerage founded in 1983 and headquartered at 1021 South 39th St., St. Louis, Missouri.

In addition to McCann's Transportation, Inc., I own McCann's Piggyback Consolidation, Inc., founded in March, 1980, which is one of the largest shipper's agent operations in St. Louis. I also own Balde Eagle Transportation Services, Inc., a spotting service founded in 1989. I have more than 43 employees and my companies have enjoyed consistent growth each year.

My brokerage operation is a member of the Transportation Broker's Conference of America, which promotes professionalism and education in the industry. I have been an active member of the TBCA, and currently serve as president.

Our companies are successful because the Motor Carrier Act of 1980 freed the transportation industry from much of the regulation that had strangled if for half a century. In the new competitive environment, contract carriers and brokers were allowed to negotiate mutually advantageous rates, eliminating dead hauls and providing shippers with more options. Consequently, the efficiency and responsiveness of the industry has risen steadily over the last decade while prices declined.

A dark cloud has appeared on the horizon -- I now face the prospect of being driven into bankruptcy for actions completely beyond my control - undercharge claims.

Unethical collection agencies are engaging in legalized theft by ferreting out technicalities in an antiquated law known as the filed rate doctrine.

The scenario is simple. A common carrier offers to move freight for me at a rate discounted from their filed tariff. I accept the offer, with the carrier's promise to file the negotiated rate with the I.C.C.. Because of the dynamic nature of the industry, it is not feasible to wait for a written confirmation from the I.C.C., which takes several days. The carrier bills the agreed-upon rate, I pay it, and everyone is satisfied.

Later, the carrier (or a collection agency, if it has gone bankrupt) sues me for the "balance due," because the carrier reneged on his promise to file the negotiated rate. I am being penalized for the carrier's dishonesty and/or negligence.

Perhaps the following analogy will make the problem clearer. A dealer offers you a new car for $1000 less than the sticker price (which is artificially high), which you accept and pay for. Everyone is pleased with the deal, and you forget all about it.

Several years later, you are sued for the $1000 discount you were offered, because the dealer never filed the new price as promised. You'd be fit to be tied, especially if the courts ruled that the unscrupulous dealer was unjustly - yet legally - entitled to the additional money.

Now, imagine your frustration if you ran a car resale shop, and hundreds of undercharge lawsuits threatened to drive you to bankruptcy. That's how my fellow brokers and I feel.

The filed rate doctrine is an anachronism in today's marketplace. The law was intended to protect brokers, shippers and the consuming public. Today, however, the filed rate doctrine is being used by carrier~~s~~ and collection agencies to victimize brokers, shippers and the consuming public. The filed rate doctrine protects no one and adds significant cost to our nation's transportation system.

The rates on file at the I.C.C. are meaningless remnants of a bygone age. The rates are unreasonably high - much more than expenses warrant or the market will bear. If they were realistic, carriers would not be negotiating discounts in the first place.

The I.C.C. has consistently ruled that "balance due" claims are unreasonable, and that common carriers should not be rewarded for their negligence and/or premeditated deceit. Several courts of appeal concurred with the I.C.C.'s decision.

In the Maislin case, however, the Supreme Court ruled that although filed rate laws were unjust, they are the law, and must be followed. They noted that the solution could only come from the nation's legislators.

That is why my fellow brokers and I are here today. We don't want special favors of you, we ask only for a fair deal.

The law currently rewards negligence, and it is the lawmakers' responsibility to stop this injustice by rewriting the law. Congress must immediately enact legislation that acknowledges the legitimacy and lawfulness of a negotiated rate. We ask Congress to relieve brokers and shippers from the strict obligation to pay the filed rate and grant the I.C.C. the authority to afford such relief.

Congress cannot afford the luxury to appoint committees or investigative groups to look into this. Each day's delay may cost another honest entrepreneur his business - and his life's savings.

I appreciate the opportunity to provide this testimony to you.

Respectfully,

Donna R. McCann

Donna R. McCann
President
McCann's Transportation, Inc.

for record

frateco

WRITTEN TESTIMONY
of
Nancy L. McCaslin dba FRATECO
8170 Rolling Hills Drive
Bozeman MT 59715
for
Hearing before THE SUBCOMMITTEE ON SURFACE TRANSPORTATION
relative to
Negotiated rates in the Trucking Industry and H.R. 3243

Nancy L. McCaslin dba FRATECO is an ICC licensed Property Broker, domiciled at 8170 Rolling Hills Drive, Bozeman MT., having operated as such since 1986, providing transportation services as an intermediary between shipper and carrier. As such, undercharge claims have plagued us since the onset.

With regard to the effects of the recent Supreme Court decision relative to Maislin Industries, U.S., Inc. v. Primary Steel, Inc., FRATECO, as well as the entire brokerage industry has been dealt a blow from which we may never recover unless immediate attention is given to legislation overturning the Maislin decision while at the same time affirming the primary jurisdiction of the ICC in settling "negotiated" vs. "filed" rates claims, and the urgency of this problem dictates that legislation be passed in this congress.

Previous to the Motor Carrier Act of 1980, there were few transportation brokers in interstate commerce. Today there are over 6000 licensed brokers, and their rapid growth is testimony to the valuable services that they contribute to freight transportation. Without legislative relief, those services can no longer be provided, thus affecting the broker, the shipper and the carrier. We must have your support in alleviating a situation which carries an impact that could be devastating to the entire industry, as well as, the economic base of every marketplace. This decision is certainly not specific to the brokerage industry, but to all shippers.

8170 ROLLING HILLS DR. • BOZEMAN, MT 59715 • (406) 586-2277

FRATECO presently has an undercharge claim pending with Atlantis Express. As is the case with previous claims we have had, the negotiated rates were agreed to by both parties, written confirmation was sent to the carrier, FRATECO was billed by the carrier according to that confirmation, FRATECO paid the carrier on the negotiated amount, and the carrier accepted payment for the negotiated rate. Then years later, the carrier comes back with a balance due billing on transportation services which were provided to us under a bilateral contract specific to their contract carrier operating authority. And those actions are sanctioned by law. It is time to change that!!! The regulations forced upon us by the recent supreme court decision do not serve the public interest, but rather protect special interest groups from competition in the marketplace.

If legislative changes are not made relative to this Supreme Court decision upholding the filed rate doctrine vs. the negotiated rate issue, many, many reputable, conscientious brokers will be put out of business, carriers nor shippers will be able to take advantage of their services, and the entire United States economy will be impacted as the consumer will be left to absorb the costs which will result from the Maislin decision as it exists today. Where is the reasonableness of the rates?

Unreasonable rates are a very real issue in the very specialized marketplace wherein FRATECO operates. To force us into paying a rate that is in excess of 38% of our negotiated rates, as per our Atlantis Express claim, affects our total industry in a very negative manner; it drives FRATECO out of business; it affects the economics of every shipper within our marketplace; and it robs both shippers and carriers of the tremendous services provided by property brokers. That is impact!!! Unless you as lawmakers take immediate action to correct the conflicts which prevail in our present law, and pass H.R. 3243, our industry will continue to struggle, as will the entire economy of these United States.

AMERITRANS, INC.℠
NATIONWIDE TRANSPORTATION SERVICES

BOB MCLEOD, PRESIDENT

July 10, 1990

United States House of Representatives
Surface Transportation Sub Committee
Room 2165
Rayburn House Office Building
Independence and South Capitol Street
Washington, District of Columbia 20515

VIA: Federal Express
AIRBILL #8112296754

Reference: Support for Negotiated Rates in the Trucking Industry and H.R. 3243

Dear U. S. Representatives:

Ameritrans, Incorporated is a Texas Corporation and Interstate Commerce Commission (ICC) licensed property broker operating under authority granted to it by the commission on June 17, 1985. (MC#182108)

Since its inception, Ameritrans has been engaged in the coordination of truckload transportation brokerage services. Presently our carrier database consists of a sum total of 826 active carriers which possess common, contract irregular route type authority respectfully. (Vans and Reefers 406; Flatbeds 420)

Pursuant to the 1980 congressional move to deregulate the trucking industry, the concept of Ameritrans has grown from 0 revenues in 1985 to approximately a 7 million dollar operation. Not only are myself and my partner intimately involved in this issue but the fifteen people we employ are as well as any decision relevant to this issue will have definitive economic effect on their livelihoods.

Ameritrans, Inc. strongly supports the Transportation Brokers Conference of America's (TBCA) position on this issue and strongly urge you to act promptly to enact immediate and retroactive legislation which would overturn the recent Maislin Decision and affirm the primary jurisdiction of the ICC in settling these "negotiated vs. filed rate" claims. We have already received some, and we anticipate being wrongfully inundated with more, of these wholly inappropriate balance due payment demands.

P. O. Box 166019, Irving, Texas 75016-6019 · 214 550 0566

AMERITRANS, INC.℠
NATIONWIDE TRANSPORTATION SERVICES

United States House of Representatives
July 10, 1990
Page Two

If you desire true competition among the nations carriers which will enhance free enterprise, offer a higher quality of service, in conjunction with a wider variety of choices, all at a lower cost, you will take the necessary steps to allow our industry to prosper. If however, you do not want competition then go ahead and shoot us, because our industry provides a critical information clearing house so that millions of shippers and consignees can shop effectively among the thousands of carriers available. Otherwise, you will stagnate the transportation industry.

We do appreciate your time and consideration of our dilemma. Again, we do urge your swift and immediate response to our plea. Thank you for your time and consideration.

Very truly yours,

Bob McLeod

AMERITRANS, INC.
Bob McLeod
President

David C. Royal

AMERITRANS, INC.
David C. Royal
Vice President

cc: Steve Furnland, Chairman Legislative Committee for TBCA
Charles Hosch, Counselor for Ameritrans, Inc.
Danny A. Bring

**GENERAL TRANSPORT & CONSULTANTS INC.**
708 Killian Road, Akron, Ohio 44319 (216) 645-6055 Watts 1-800-678-6055

July 12, 1990

TO: U.S. House of Representatives Subcommittee on Surface Transportation

This letter is in regards to the July 17th hearings on the Negotiated Rates Issue. The recent decision by the Supreme Court is going to have extreme ramifications on the brokerage industry, and in particular, small companies like General Transport & Consultants, Inc.

General Transport & Consultants, Inc., is a privately held brokerage operation based in Akron, Ohio since July of 1984. We provide truckload and large LTL services to our customers along with special services such as freight management, freight bill auditing, claim auditing and carrier negotiating. I feel that General Transport & Consultants, Inc., and the brokerage industry in general are a viable part of the transportation industry of this country.

General Transport & Consultants, Inc., is making a request for immediate legislation overturning the Maislin Decision and affirming the primary jurisdiction of the ICC in settling these "negotiated vs. filed rates" claims.

Sincerely,

GENERAL TRANSPORT
& CONSULTANTS, INC.

Daniel B. Rafferty
Daniel B. Rafferty
Vice President

DBR/pr

fts
FREIGHT TRAFFIC SERVICES
58 Chambers Brook Road, Somerville, NJ 08876 • 201-526-8700 • 800-526-3972 (except NJ) • FAX 201-526-8740

**BEFORE THE**

**SUBCOMMITTEE ON**

**SURFACE TRANSPORTATION**

**of the**

**COMMITTEE ON PUBLIC WORKS**

# STATEMENT

# on

# UNITED STATES SUPREME COURT DECISION

# in

# CASE NO. 89-624

# MAISLIN INDUSTRIES, U.S. V. PRIMARY STEEL

*July 19, 1990*

*Submitted by:*

**Donald J. Sooy**
**President**
**FTS INDUSTRIES, INC.**
**58 Chambers Brook Road**
**Somerville, NJ 08876**

Divisions: FTS Freight Traffic Services - TRANSPORTATION MANAGEMENT AND CONSULTING
ICS - Intermodal Consolidating Services, Inc. - LICENSED PROPERTY BROKER
STS Transportation Inc. - CONTRACT MOTOR CARRIER
CTS - Creative Transportation Services - SHIPPING AGENT

STATEMENT OF:

Donald J. Sooy
President
FTS INDUSTRIES, INC.
Somerville, NJ

## INTRODUCTION

I am Donald J. Sooy, President of FTS Industries, Inc.; 58 Chambers Brook Road; Somerville, NJ 08876.

I am a member of the Board of Directors of the Transportation Brokers Conference of America, as well as the First Vice President of this organization.

FTS Industries, Inc. employs approximately 90 people conducting operations through its two subsidiaries:

(1) Freight Traffic Services

A full service transportation consulting firm which has been in business since 1963. Freight Traffic Services has employees which include transportation specialists licensed to practice before the Interstate Commerce Commission, as well as the Federal Maritime Commission, certified cargo claims specialists, and numerous other technically oriented people with up to 40 years of experience in the transportation industry.

Freight Traffic Services provides a complete range of transportation consulting services to the shipping public. Chief among these services provided, is the audit and payment of freight bills.

Other services provided by Freight Traffic are:

- The development and preparation of routing guides
- Post audit of freight bills
- Site selection studies
- Preparation of bills-of-lading
- Classification of commodities
- The filing and collection of cargo claims

The above is an example of the services offered which include any type of traffic and transportation need required of the shipping public.

(2) Intermodal Consolidating Services, Inc.

This is a property broker, licensed by the Interstate Commerce Commission to arrange for transportation throughout the United States. ICS obtained its license from the Interstate Commerce Commission in 1979, shortly after the regulations surrounding property brokers were relaxed, thereby permitting greater and freer entry into this field.

As a result of the Motor Carrier Act of 1980, the demand for the services (property brokering) provided by ICS, escalated significantly. The relaxation of entry standards into the property motor carrier field, resulted in the influx of numerous additional motor carriers, as well as the expansion of most of those in existence at the time of the Motor Carrier Act of 1980. The vast preponderance of the new entries and the expansion of the existing ones, involved small carriers who greatly needed the services of entrepreneural property brokers who could provide them with business to support their new or expanded operations.

In addition to bringing greatly needed reform and substantial economies to the transportation industry, the Motor Carrier Act of 1980 also spawned a host of small entrepreneural firms numbering in the thousands who now operate as either motor carriers and/or property brokers serving the shipping public throughout the country in a most efficient and economical manner. Freight rates and charges have been reduced and the time in transit service has been greatly improved since the Motor Carrier Act of 1980. Undoubtedly, all of these efficiencies and economies have been primarily achieved by small firms such as ourselves and small motor carriers who have interjected the much needed competition into the transportation market.

## (I) Summary Position

On June 21, 1990, the United States Supreme Court in Maislin Industries, U. S. v. Primary Steel, in a 7-2 decision reversed the earlier decisions of twenty (20) Circuit Court of Appeals judges in seven (7) circuits, as well as condemned the stated policy of the Interstate Commerce Commission.

Specifically, the Supreme Court rejected the ICC's equity defense policy and upheld the so-called "Filed Rate Doctrine". The Filed Rate Doctrine requires transportation carriers to charge, and shippers to pay, strictly in accordance with tariffs published and on file with the Interstate Commerce Commission.

WHILE NO DOUBT THE SUPREME COURT ACTED WITH INFINITE LEGAL WISDOM, NEVERTHELESS THE NET EFFECT OF THE COURT'S ACTION IS TO IMPOSE UPON THOUSANDS OF SHIPPERS, PROPERTY BROKERS, AND OTHER PARTIES RESPONSIBLE FOR THE PAYMENT OF FREIGHT CHARGES, THE LEGAL REQUIREMENT TO PAY UPWARDS OF $200,000,000 IN ADDITIONAL FREIGHT CHARGES ABOVE AND BEYOND THE ORIGINAL FREIGHT CHARGES AGREED TO, ASSESSED BY, AND ORIGINALLY COLLECTED BY THE MOTOR CARRIERS.

TO ADD INSULT TO INJURY, IN MOST INSTANCES, THIS TOTALLY UNDESERVED AND IN SOME INSTANCES, BORDERING ON FRAUDULENT WINDFALL WILL BE REAPED NOT BY THE MOTOR CARRIERS WHO PROVIDED THE ORIGINAL TRANSPORTATION IN QUESTION — BUT RATHER BY FREIGHT

AUDIT BUREAUS WHO HAVE NO STANDING IN THE ORIGINAL TRANSPORTATION CONTRACTS SINCE THEY ARE ACTING SOLELY IN THE SELF INTERESTS OF THEIR OWNERS AND AS SCAVENGERS OF THE BONEFIDE ESTATES OF BANKRUPT MOTOR CARRIERS. THE PRIMARY BENEFICIARY OF THE SUPREME COURT'S DECISION--AND THE ONES WHO WILL RECEIVE THE GOLDEN LARGESS WHICH WILL FLOW AS A RESULT OF THIS DECISION--ARE INDIVIDUALS WHO SERVE NO CONSTRUCTIVE PURPOSE IN THE TRANSPORTATION INDUSTRY. A VERY SMALL, SELECT FEW WILL BENEFIT AT THE EXPENSE OF THE MANY WHO ACTED IN GOOD FAITH AND WERE FURTHER MISLED BY THE MOTOR CARRIERS REGARDING FREIGHT RATE AGREEMENTS.

CONGRESS MUST ACT SWIFTLY TO REVERSE THE PROCESS THAT HAS BEEN UNLEASHED BY THIS DECISION, EVEN AS WE SPEAK. SPECIFICALLY, COLLECTION AGENCIES AND FREIGHT AUDIT BUREAUS HAVE ALREADY STEPPED UP THEIR ACTIVITIES THREATENING LITIGATION (WHICH WILL BE UPHELD BY THE SUPREME COURT'S DECISION) TO COLLECT THE HUNDREDS OF THOUSANDS OF BALANCE DUE BILLS WHICH HAVE BEEN HELD IN ABEYANCE OVER THE PAST FEW MONTHS AWAITING THE SUPREME COURT'S DECISION. UNLESS CONGRESS ACTS IMMEDIATELY TO REVERSE THIS GROSS MISCARRIAGE OF JUSTICE, THE ONLY SINGLE EVENT WHICH WILL MONETARILY EXCEED THE DEVASTATION TO BE WROUGHT, WILL BE THE SAVINGS AND LOAN DEBACLE NOW BEING CLEANED UP AT THE EXPENSE OF THE U. S. TAXPAYER.

THE MOTOR CARRIER ACT OF 1980 WAS ENACTED TO BRING ABOUT REFORM IN THE TRANSPORTATION INDUSTRY AND TO ELIMINATE THE GOVERNMENTAL BUREAUCRACY AND LEGALITIES WHICH HOBBLED THE INDUSTRY. IT SOUGHT TO TAKE TRANSPORTATION IN OUR COUNTRY INTO THE TWENTY-FIRST CENTURY. IF IT IS NOT REVERSED, IMPOSITION OF THE "FILED RATE DOCTRINE" WILL DESTROY ALL OF THE ECONOMICAL BENEFITS WHICH THE SHIPPING PUBLIC HAS RECEIVED AND ENJOYED AS A RESULT OF THE MOTOR CARRIER ACT OF 1980.

I SINCERELY BELIEVE THAT THE VERY LIVELIHOOD OF BOTH MYSELF AND MY 90 EMPLOYEES WILL BE DETERMINED BY THE ACTION OR INACTION OF CONGRESS IN ADDRESSING THIS MONUMENTAL PROBLEM. ALL OF US URGE AND PLEAD FOR YOUR HELP IN PRESERVING OUR JOBS.

## II. U. S. Supreme Court Decision in Case 89-624 Maislin Industries U. S. v. Primary Steel

While the Supreme Court's 7-2 decision upholding the "Filed Rate Doctrine" and its condemnation of the Interstate Commerce Commission's policy in finding that the collection of tariff charges under these circumstances constitutes an unreasonable practice. Nevertheless, the majority in the decision went out of their way to point out the following:

> "The filed rate is not enforcable if the ICC finds the rate to be unreasonable."

In oral arguments before the Court, opponents to the Filed Rate Doctrine argued that:

> "When the reason for the law no longer exists, the law itself no longer exists."

Indeed the two dissenting justices contended that competitive realities in the transportation marketplace had changed substantially because of re-regulation and that therefore the Filed Rate Doctrine was no longer required to avoid price discrimination by motor carriers. In fact, they argued that the Filed Rate Doctrine was no longer effective in accomplishing this task.

It is more than obvious from a reading of the Supreme Court's decision that legal realities demanded the decision which they rendered. However, they too appear to have recognized from the record that:

> The reason for the law no longer exists, however, as long as the law itself exists, it is their duty to uphold it. It is Congress' duty to change it.

## III. Re-Regulation or De-Regulation: That Is The Question

The Motor Carrier Act of 1980 which was enacted after substantial hearings throughout the country and notwithstanding the enormous lobbying efforts of the then encumbant motor carrier establishment, which sought to retain the mantle of government protection and guarantees against failures.

It was clearly the intent of the majority to significantly reduce the amount of onerous government regulation, which at that point in time was severely limiting the efficiency of the motor carrier industry. Most of the predictions concerning savings to the shipping public in the billions of dollars, have come to pass. For the most part, service of motor carriers has never been better and rates and charges (prior to the recent Supreme Court decision) have been highly competitive and economical to the shipping public. The Motor Carrier Act of 1980 has been lauded in numerous circles for having obtained the highest aspirations envisioned at the time of its passage. Literally billions of dollars annually have been cut from the nationwide transportation bill.

Unfortunately, even though the Act was touted in the media and many quarters as "The Deregulation Bill", in fact Congress retained the tariff filing requirements of motor common carriers. There were many in transportation, both carriers and shippers who failed to recognize this technicality. The atmosphere immediately following the Motor Carrier Act of 1980, and for the next seven or eight years thereafter, was one of "total deregulation". Motor carriers were offering and shippers were accepting verbal and written rate quotations and discount provisions which were never ultimately published nor filed by the motor carrier in question. These practices became pervasive throughout the industry. While there were those few voices "crying in the wilderness", cautioning participants against accepting verbal and/or written rate quotations from motor carriers without publication and filing with the Interstate Commerce Commission, perhaps the vast majority of those in transportation were acting as if the media hype was correct. That is, they were acting as if the Motor Carrier Act had "totally deregulated" the motor carrier industry.

It was not until years afterwards when the first motor carriers either liquidated or went bankrupt did the magnitude of the severe problem facing the shipping public surface. That is to say that rate audit bureaus of behalf of Trustees in bankruptcy for motor carriers began submitting balance due bills in the hundreds of millions of dollars demanding payment of legally filed tariff rates as opposed to the rates and charges agreed upon between the carrier and shipper and in fact, assessed by the carrier and paid by the shipper. Surely it was not the intention of Congress that a few rate audit bureaus should enjoy unjust enrichment at the expense of the shipping public.

The stated purpose of the Motor Carrier Act of 1980 was to lift the burdens of government and technicalities which had been foisted upon carriers and industry for 45 years. Not to entrap the public into believing in deregulation, only to find out years later that the legislators had not crossed their "i's" nor dotted their "t's".

Deregulation was the stated purpose of the changes which occured in 1980. However, as was pointed out by Justice William J. Brennan in the Supreme Court decision:

> "If strict adherence to the tariff filing requirements as embodied in the Filed Rate Doctrine has become an anachorism in the wake of the Motor Carrier Act, it is the responsibility of Congress to modify or eliminate these sections."

This, then is the question to be considered by Congress. Was it the intention of the Motor Carrier Act of 1980 to deregulate or to entrap the shipping public? If it was to deregulate, which must be the conclusion of any observer--including the Supreme Court--then as Justice Brennan wrote, it is the responsibility of Congress to eliminate the tariff filing requirement and to nullify the effect of the Filed Rate Doctrine immediately.

Respectfully submitted,

Donald J Sooy

Donald J. Sooy
President
FTS INDUSTRIES, INC.

# WRITTEN STATEMENT OF

# GSA INTERNATIONAL LTD.

BEFORE

THE SUBCOMMITTEE ON SURFACE TRANSPORTATION

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

UNITED STATES HOUSE OF REPRESENTATIVES

Prepared by:

Gregory Stachura, President
39500 Orchard Hill Place Drive
Suite 205
Novi, MI 48375

My name is Gregory Stachura and I am President of GSA International Ltd. which is an I.C.C. licensed property brokerage, (established in 1983,) engaged in the business of "arranging transportation for compensation" as the I.C.C. has authorized.

I am also the immediate past president of the Transportation Brokers Conference of America which you may know as the non-profit trade association which represents the brokerage industry.

Personally, I have had nearly twenty years experience in transportation having worked for both motor carriers and shippers in several capacities dealing with motor truck transportation.

The issue of negotiated rates in the motor carrier industry is representative of the difficulties faced when change is introduced in the marketplace. While certain parties in the transportation industry have seized the opportunities provided by Congress in the Motor Carrier Act of 1980 and have exercised the freedoms given to them by the Act to bring tremendous improvements in real productivity to the motor carrier industry, others continue the call for a return to the highly structured and regulated market of yesteryear.

My colleagues in the industry have no doubt, recapped the history of regulation in the motor carrier industry and I do not wish to be redundant. Suffice it to say that service and price have never been of greater value in the motor carrier industry than they have been since the motor carrier Act of 1980. Indeed it is true that some companies have not survived deregulation while others have grown and prospered. That has been true in other industries as well including automotive, retailing, manufacturing, etc.

The negotiated rates issue involves a strict interpretation of an archaic statute which was a bonafide oversight when Congress passed the Motor Carrier Act of 1980 to breathe vigorous competition into a lethargic trucking industry. That archaic statute is popularly known as the "filed rate doctrine" and the oversight of congress in not repealing that statute has visited a serious dilema on those involved in the business of moving goods in the marketplace.

We all understand the mechanics of the problem which involves negligence in some cases; misrepresentation or fraud in others. Simply stated, motor carriers agreed to provide transportation at a negotiated price and did so subsequently billing and collecting that price. Later, those carriers, (or their agents authorized in bankruptcy or liquidation proceedings) sought to collect the difference between the agreed upon, collected charges and the filed rates which may or may not have ever effectively attracted business in the competitive markets.

No other industry conducts itself by such dishonorable practices. Such practices should not be allowed in the motor carrier industry!

The intent of Congress was expressly stated to promote competitive and efficient transportation services. The spirit is clear and yet, by oversight, the letter of the law is an impediment to the fulfillment of that spirit. This sometimes happens in governments. But when such oversights visit injustice on innocent parties in the most harsh manner, a moral and honorable government must intercede to provide relief. Such is the case in the negotiated rates issue.

Further, the government itself suffers some culpability in this matter because the government's own agency, the I.C.C. was charged with responsibility for overview, and although the commission was well aware of the practices in the marketplace, the I.C.C. did not sound the alarm, nor did it intervene to stop practices which may have conflicted with statute. Yet all the while shippers, carriers, and brokers relied on the guidance of the I.C.C.

H.R. 3243 attempts to resolve the issue of negotiated rates, yet it's present language may not do the job, either cleanly, or for the long term. H.R. 3243 could however, be amended to provide a vehicle by which Congress can bring swift relief to those earnest and innocent parties suffering under the Supreme Court's Maislin decision._

Congress should be mindful of the fact that the I.C.C. is grossly underfunded and understaffed to the point that only the most cursory and superficial performance can be reasonably expected. Before the Congress sends the tens of thousands of negotiated rates disputes to the commission, Congress should consider the practicality of that direction. Layering administrative arbitration into the activities of the transportation industry flies in the face of the original congressional intent to promote competitive and efficient transportation services. Perhaps the success of the free market since 1980 will provide the encouragement that congress may need to pursue a comprehensive review to identify not only the filed rate doctrine but any other "gray areas" which impede further progress in the transportation marketplace.

**Buckbee-Mears**
**Cortland**
A UNIT OF BMC INDUSTRIES

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Cortland, NY 13045
607/753-9815 FAX 607/753-8198

July 24, 1990

Rep. Sherwood Boehlert
U. S. House of Representatives
Longworth Office Bldg.
Room 1127
Washington, D.C. 20515

Dear Representative Boehlert:

It has come to my attention that the House Public Works & Transportation Committee is considering legislation remedying the disastrous effects of the "Published Rate Doctrine" on shippers. The "Published Rate Doctrine" is a calamity for shippers nationwide, and it is imperative that action be taken immediately to remove this cloud from over our heads.

Since deregulation, shippers like Buckbee-Mears Cortland have been permitted legally to negotiate rates below a carrier's published rates. In permitting negotiated rates, however, Congress failed to consider fully -- and address appropriately -- the ancient "Published Rate Doctrine" and its effect in a deregulated era. Because of the potential applicability of this court-created anachronism, we at Buckbee-Mears Cortland find ourselves at risk to pay a carrier (or, more likely, a bankruptcy trustee) the difference between rates we've negotiated in good faith and the carrier's officially published rates. We are already faced with one actual claim, which could have significant adverse effects on our business. This situation is ripe for abuse: While carriers are required to publish their negotiated rates in order to make them effective, we shippers lose out of pocket if the carrier fails to publish. This is nothing but an open invitation to fraud.

In any legislation addressing this inequity, the only fair and logical approach is to correct the situation retroactively, effective as of the date rate negotiation first was permitted. Otherwise, all shippers will live perpetually with a very real likelihood of substantial financial injury -- despite their prior payment in full of all amounts negotiated in good faith. The only parties who stand to profit in the current environment are shippers who negligently or intentionally fail to publish their negotiated rates; bankruptcy attorneys; self-styled freight auditors attempting to capitalize on a legislative oversight; and, the bankrupt carrier's creditors, who certainly were not aware of the possibility of these sums and never relied on them when extending credit, and who would minimize the result of their own consciously accepted risk at the expense of innocent shippers.

We at Buckbee-Mears Cortland and many other shippers in the Cortland area are very aware of the impact of this issue. This particular issue more than most seems like the intent of the law was excellent, but the present interpretation is extremely unfair. If you need any additional information on how this whole issue is playing, I would certainly appreciate talking with you about it.

Sincerely,

Paul H. Wikerd

Paul H. Wikerd
Vice President/General Manager

SURFACE TRANSPORTATION
HR 3243/UNDERCHARGE
Wylie, Chalmers P. (Hon.)
JF/ms

August 14, 1990

Honorable Chalmers P. Wylie
2310 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Wylie:

Thank you for your letter in which you enclosed comments from Joseph J. Waiter of the Sherex Chemical Company, Inc.

Per your request, Mr. Waiter's comments will be included in the record for the hearings on H.R. 3243.

Sincerely,

NORMAN Y. MINETA
Chair
Subcommittee on Surface
Transportation

CHALMERS P. WYLIE
15th District Ohio

2310 Rayburn House
Office Building
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200 North High Street
Columbus OH 43215
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WALLER C. BLOOM
District Representative

Congress of the United States
House of Representatives
Washington, DC 20515

Committees
BANKING, FINANCE AND URBAN AFFAIRS

Subcommittees
Consumer Affairs
Housing and Community Development
Financial Institutions Supervision, Regulation and Insurance

VETERANS' AFFAIRS

Subcommittees
Compensation, Pension, and Insurance
Education and Training

JOINT ECONOMIC

July 20, 1990

Honorable Norman Y. Mineta
Chairman
Subcommittee on Surface Transportation
B376 Rayburn House Office Building
INSIDE MAIL

Dear Mr. Chairman:

Enclosed is a copy of a letter from a constituent of mine, Mr. Joseph J. Waiter, who works for an important chemical company in my district. Mr. Waiter is in support of H.R. 3243.

I would respectfully like to request that the subcommittee include Mr. Waiters's remarks into the record of the subcommittee's proceedings on this matter.

Thank you for your assistance.

Very truly yours,

CHALMERS P. WYLIE
Representative in Congress

CPW:z
Enclosure

JUL 1 8

SHEREX

**Joseph J. Walter**
Secretary and
General Counsel

**Sherex Chemical Company, Inc.**

5777 Frantz Road
P.O. Box 646 • Dublin, Ohio 43017
(614) 764-6500

*July 13, 1990*

*The Honorable Chalmers P. Wylie*
*U. S. House of Representatives*
*2310 Rayburn HOB*
*Washington, D.C. 20515*

*RE: HR 3243 AND THE NATION'S DEFICIT*

*Dear Congressman:*

*We are outraged at the Supreme Court's decision of June 21, 1990 in Maislin v. Primary Steel, 110 S. Ct. 884, which held that shippers must pay the difference between the rates we negotiated with motor carriers and the higher filed tariff rates which the carrier failed to charge to reflect our agreements.*

*Can you imagine receiving a bill five years after your last household goods move demanding payment of thousands of dollars more because the van-line failed to properly file your agreed rates in its tariff at the I.C.C.? Or, receive a similar bill from an airline for an unpublished fare?*

*Is this the result that Congress intended when it enacted the Motor Carrier Act of 1980 to generate a more competitive trucking industry? The I.C.C. does not believe that Congress intended such an unconscionable result, and that it was given discretionary powers to rule that it is an unreasonable practice to collect more than the agreed rate in the less-regulated transportation environment of the 1980's. See Negotiated Rates, 5 I.C.C. 623 (1989).*

*The Supreme Court has refused to accept the I.C.C.'s discretionary powers as a lawful way to modify its previously strict application of the filed rate doctrine, and shippers will have to pay approximately $200 million as a result. However, these freight charges will not be paid to the defunct carriers - approximately 80% will go to collection agencies, auditors and their attorneys as commissions for collecting these moneys!*

July 13, 1990
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As a matter of fact, when applied in combination with recent I.C.C. decisions which have invalidated contracts with motor carriers due to their failure to strictly comply with regulations, thus exposing shippers to common carrier tariff rates, this decision could cost the shipping public (and thus consumers) billions of dollars!

It must be obvious that the Supreme Court's decision serves no public policy, and must be overturned by Congress. A coalition of shippers, motor carriers and brokers are supporting HR 3243 which is being considered on July 17 by the Senate Committee on Commerce, Science & Transportation, and on July 19 by the House Public Works and Transportation Committee.

We urge you to inform the Chairmen of both Committees of your support for HR 3243, and we request your affirmative vote when this measure is submitted for a vote.

Lastly, we urge you to consider this crisis in connection with your efforts to reduce the national deficit. Unless the Supreme Court's ruling is overturned by Congress, monumental increases in the I.C.C.'s appropriations will be necessitated to handle the thousands of cases which will be referred to the I.C.C. for a determination of the reasonableness of the filed tariff rates. (See Footnote No. 10 in Maislin). Such a result can be avoided only be enacting HR 3243 before the end of the current session of Congress. Any later action will be too late to stop the granting of Motions for Summary Judgments in our pending law suits.

Yours very truly,

Joseph J. Waiter

JJW/js